THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

R

Mx. North Gallery.

UNIVERSITY OF LONDON
LIBRARY

1949

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

Editor - - - - RALPH SUTTON, K.C.
Associate Editor - - HENRY SALT, K.C

Reporters:

Court of Appeal - - -
King's Bench,
Court of Criminal Appeal;
Appeals from County Courts;
and Railway and Canal Commission Cases.

H. C. GARSIA,
A. W. GRANT,
C. G. MORAN,
B. A. BICKNELL,
P. B. DURNFORD,
H. GREENFIELD,
R. P. COLINVAUX,
L. F. J. McDERMOTT

Barristers-at-Law

R. C. CALBURN, *Barrister-at-Law*

1949—Vol. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
LONDON, E.C.4.

BIBL.
LONDIN
UNIV.

THE
INCORPORATED COUNCIL OF LAW REPORTING
FOR
ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—Sir Stanley Pott
Vice-Chairman—J. H. Stamp, Esq.

EX-OFFICIO MEMBERS

Right Hon. Sir Hartley Shawcross, K.C., M.P.	Attorney-General
Right Hon. Sir Frank Soskice, K.C., M.P.	Solicitor-General
Harold N. Smart, Esq., C.M.G., O.B.E., J.P.	President of the Law Society

ELECTED MEMBERS

J. H. Stamp, Esq. The Rt. Hon. Lord Justice Jenkins	Lincoln's Inn
R. E. Burrell, Esq., K.C. J. V. Nesbitt, Esq.	Inner Temple
W. Price, Esq. W. Latey, Esq., M.B.E.	Middle Temple
Sir William L. McNair, K.C. S. E. Pocock, Esq., O.B.E.	Gray's Inn
H. Edmund Davies, Esq., K.C. R. E. Megarry, Esq.	Appointed on the nomination of the General Council of the Bar
Sir Stanley Pott (Firm : Messrs. Holmes, Son & Pott) G. D. Colclough, Esq. (Firm : Messrs. Johnson, Jecks & Colclough)	The Law Society

Secretary—J. H. Bowman, Esq.
6 Stone Buildings, Lincoln's Inn, W.C.2.

BIBL. LONDIN. UNIV.

JUDGES

OF

THE COURT OF APPEAL

1949

Lord JOWITT, Lord Chancellor

Lord GODDARD, Lord Chief Justice of England

Lord GREENE Sir FRANCIS RAYMOND EVERSHED	Masters of the Rolls
Lord MERRIMAN	President of the Probate, Divorce, and Admiralty Division

Sir FREDERICK JAMES TUCKER

Sir ALFRED TOWNSEND BUCKNILL

Sir DONALD BRADLEY SOMERVELL

Sir LIONEL LEONARD COHEN

Sir CYRIL ASQUITH

Sir FRANCIS RAYMOND EVERSHED
(Appointed Master of the Rolls, May 28, 1949)

Sir JOHN EDWARD SINGLETON

Sir ALFRED THOMPSON DENNING

Sir DAVID LEWELLYN JENKINS
(Appointed, May 28, 1949)

JUDGES
OF
THE KING'S BENCH DIVISION
OF
THE HIGH COURT OF JUSTICE
1949

Lord GODDARD, Lord Chief Justice of England, President

Sir TRAVERS HUMPHREYS

Sir MALCOLM HILBERY

Sir WILFRID HUBERT POYER LEWIS

Sir ROLAND GIFFARD OLIVER

Sir REGINALD POWELL CROOM-JOHNSON

Sir WINTRINGHAM NORTON STABLE

Sir JAMES DALE CASSELS

Sir HUGH IMBERT PERIAM HALLETT

Sir WILLIAM NORMAN BIRKETT

Sir AUSTIN ELLIS LLOYD JONES

Sir GEORGE JUSTIN LYNSKEY

Sir JOHN WILLIAM MORRIS

Sir FREDERICK AKED SELLERS

Sir LAURENCE AUSTIN BYRNE

Sir FRED EILLS PRITCHARD

Sir GEOFFREY HUGH BENBOW STREATFEILD

Sir DONALD LESLIE FINNEMORE

Sir GERALD OSBORNE SLADE

Sir PATRICK ARTHUR DEVLIN

Attorney-General

Sir HARTLEY WILLIAM SHAWCROSS

Solicitor-General

Sir FRANK SOSKICE

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1949, will be as follows :—

In the First Series,
[1949] Ch.
In the Second Series,
[1949] 1 K. B. [1949] 2 K. B. [1949] P.
In the Third Series,
[1949] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME

A. PAGE

Acton Borough Council *v.* West Middlesex Assessment Committee – – – – – 10
Ameris (W. J.) Car Sales (Third Party). Warman *v.* Southern Counties Car Finance Corpn., Ld. – – – – – – 576
Asher, Seaford Court Estates, Ld. *v.* – – – – 481
Attorney-General *v.* Hunter – 111

B.

Ball *v.* London County Council 159
Barefoot *v.* Clark – – – 97
Barrett (B. E.), Ld. Ex parte Rex *v.* Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area – 17
Bellgrove Properties, Ld., Jones *v.* – – – – 700
Bradfield R.D.C., Homes *v.* – 1
British Phosphate Commissioners, Steamship "Induna" Co., Ld. *v.* – – – 430
Brock *v.* Wollams – – – 388
Brook, Rex *v.* – – – 138
Burningham, Mason *v.* – – 545

C.

Caminer and Wife *v.* Northern and London Investment Trust, Ld. – – – – – 64
Canadian Pacific Railway *v.* Gaud – – – – 239

PAGE

Carr *v.* Mercantile Produce Co., Ld. – – – – – 601
Cibulia, Wimbush *v.* – – 564
Clark, Barefoot *v.* – – – 97
Clucas, Rex *v.* – – – 226
Coblentz, Edgware Estates, Ld. *v.* – – – – 717
Commissioners of Works and Buildings, Parkinson (Sir Lindsay) & Co., Ld. *v.* – 632
Coombs, Roberts *v.*– – – 221
Commissioners of Customs and Excise *v.* Ingram – – 103
Co-operative Press, Ld., Nagy *v.* 188
Coulson & Co., Ld. (Third Parties). Victoria Laundry (Windsor), Ld. *v.* Newman Industries, Ld. – – – 528

D.

Davies *v.* Swan Motor Co. (Swansea), Ld. James Third Party – – – – 291
Davis, Oliver *v.* – – – 727
Dennis (J.) & Co., Ld. *v.* Munn 327
Dunn, Mallett *v.* – – – 180

E.

East Norfolk Rivers Catchment Board, Marriage *v.* – – 456
Edgware Estates, Ld. *v.* Coblentz 717
Elcock *v.* Thomson – – 755
Erith Corporation *v.* Holder – 46

F. PAGE

Fairbairn, Rex *v.* – – – 690
Francois Tagher, Barcelona, and Podar Trading Co., Ld. Bombay, In re an Arbitration between – – – – 277

G.

Gallagher *v.* Shilcock – – 765
Gaud, Canadian Pacific Railway *v.* – – – – 239
General Accident Fire and Life Assurance Corpn., Ld., Stuchbery *v.* – – – – 256

H.

Harris *v.* Rowley – – – 697
Helman *v.* Horsham and Worthing Assessment Committee – 335
Hoddinott *v.* Hoddinott – – 406
Hogan, Wolfe *v.* – – – 194
Holder, Erith Corporation *v.* – 46
Holmes *v.* Bradfield Rural District Council – – – 1
Horsey, Minister of Pensions *v.* 526
Horsham and Worthing Assessment Committee, Helman *v.* 335
Horton *v.* London Graving Dock Co., Ld. – – – – 584
Howard, Woods and, James Bibby, Ld. *v.* – – – 449
Howells, Jenkins *v.* – – 218
Hunter, Attorney-General *v.* – 111
Hurst, Rose *v.* – – – 372

I.

Ingram, Commissioners of Customs and Excise *v.* – – 103
Ingram, Tower Cabinet Co., Ld. *v.* – – – – 397
Inland Revenue Commissioners, Potts' Executors *v.* – – 706

J.

James (Third Party), Davies *v.* Swan Motor Co. (Swansea), Ld. – – – – – 291

PAGE

James Bibby, Ld. *v.* Woods and Howard – – – – 449
Jenkins *v.* Howells– – – 218
Jones *v.* Bellgrove Properties, Ld. – – – – – 700

K.

King, The, Reading *v.* – – 232

L.

Lamdin, Phillips *v.* – – 33
Larner *v.* London County Council 683
Lawrence *v.* Sinclair – – 77
Lazarus-Barlow *v.* Regent Estates Co., Ld. – – 465
Levinski, Wimbush *v.* – – 564
Lewisham Borough *v.* Roberts 608
Licensing Authority for Goods Vehicles for the Metropolitan Area, Rex *v.* Ex parte B. E. Barrett, Ld. – – – 17
London County Council, Ball *v.* 159
London County Council, Larner *v.* – – – – 683
London Graving Dock Co., Ld., Horton *v.* – – – – 584
Long Eaton Co-operative Society, Ld. *v.* Smith – – 144
Luftig, Younghusband *v.* – 354

M.

Macadam, Wright *v.* – – 744
Mackley *v.* Nutting – – 55
Mallett *v.* Dunn – – – 180
Marriage *v.* East Norfolk Rivers Catchment Board – – 456
Marsh *v.* Moores (J.) Marsh *v.* Moores (P.)– – – – 208
Mason *v.* Burningham – – 545
Mercantile Produce Co., Ld., Carr *v.* – – – – 601
Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts 608
Metropolitan Water Board, Rider *v.* – – – – 378
Minister of Pensions *v.* Horsey– 526

PAGE

Moores, Marsh *v.* – – – 208
Munn, Dennis (J.) & Co., Ld. *v.* 327

N.

Nagy *v.* Co-operative Press, Ld. 188
Neal, Rex *v.* – – – – 590
Newman Industries, Ld., Victoria Laundry (Windsor), Ld. *v.* Coulson & Co., Ld. (Third Parties) – – – – 528
Northern and London Investment Trust, Ld., Caminer and Wife *v.* – – – – 64
Norton *v.* White – – – 87
Nottinghamshire County Council, Sampson (Walter) Decd. s Executors *v.* – – 439
Nutting, Mackley *v.* – – 55

O.

Oliver *v.* Davis – – – 727

P.

Parkinson (Sir Lindsay) & Co., Ld. *v.* Commissioners of His Majesty's Works and Public Buildings – – – – 632
Phillips *v.* Lamdin – – – 33
Podar Trading Co., Ld. Bombay and Francois Tagher, Barcelona, In re an Arbitration between – – – – 277
Porter, Rex *v.* – – – 128
Potts Executors *v.* Inland Revenue Commissioners – – 706

R.

Railway Executive, Stowell *v.* – 519
Raymond Russell, Royal Crown Derby Porcelain Co., Ld. *v.* – 417
Reading *v.* The King – – 232
Regent Estates Co., Ld., Lazarus-Barlow *v.* – – – 465
Rex *v.* Brook – – – 138
Rex *v.* Clucas – – – 226
Rex *v.* Fairbairn – – – 690

PAGE

Rex *v.* H. Sherman, Ld. – – 674
Rex *v.* Neal – – – – 590
Rex *v.* Porter – – – 128
Rex *v.* The Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area. Ex parte B. E. Barrett, Ld. 17
Rider *v.* Metropolitan Water Board – – – – 378
River DouglasCatchment Board, Smith and Snipes Hall Farm Ld. *v.* – – – – 500
Roberts *v.* Coombs – – – 221
Roberts, Metropolitan Borough and Town Clerk of Lewisham *v.* – – – – 608
Rose *v.* Hurst – – – 372
Rowley, Harris *v.* – – – 697
Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell 417

S.

Sampson (Walter) Decd.'s Executors *v.* Nottinghamshire County Council – – – 439
Seaford Court Estates Ld. *v.* Asher– – – – – 481
Sherman (H.), Ld., Rex *v.* – 674
Shilcock, Gallagher *v.* – – 765
Sinclair, Lawrence *v.* – – 77
Smith, Long Eaton Co-operative Society, Ld. *v.* – – – 144
Smith and Snipes Hall Farm, Ld. *v.* River Douglas Catchment Board – – – – 500
Southern Counties Car Finance Corpn., Ld., Warman *v.* – 576
Steamship "Induna" Co., Ld. *v.* British Phosphate Commissioners – – – – 430
Stowell *v.* Railway Executive – 519
Stuchbery *v.* General Accident Fire and Life Assurance Corporation, Ld. – – – 256
Swan Motor Co. (Swansea), Ld., Davies *v.* James Third Party 291

PAGE

T.

Thomson, Elcock *v.* – – 755
Tower Cabinet Co., Ld. *v.* Ingram – – – – 397

V.

Victoria Laundry (Windsor), Ld. *v.* Newman Industries, Ld. Coulson & Co., Ld. (Third Parties) – – – 528

W.

Warman *v.* Southern Counties Car Finance Corporation, Ld. W. J. Ameris Car Sales (Third Party) – – – – 576
West Middlesex Assessment Committee, Acton Borough Council *v.* – – – – 10
White, Norton *v.* – – – 87
Wimbush *v.* Cibulia. Wimbush *v.* Levinski – – – 564
Wolfe *v.* Hogan – – – 194
Wollams, Brock *v.* – – 388
Woods and Howard, James Bibby, Ld. *v.* – – – 449
Wright *v.* Macadam – – 744

Y.

Younghusband *v.* Luftig – – 354

CASES JUDICIALLY CONSIDERED

Atlantic and Pacific Fibre Importing Co., Ld., In re [1928] Ch. 836.
Approved. Jones *v.* Bellgrove Properties, Ld. - **C. A. 700**

Attorney-General v. *Schiers* (1835) 2 C. M. & R. 286.
Followed. Attorney-General *v.* Hunter - - **Morris J. 111**

Baker v. *Walker* (1845) 14 M. & W. 465
Discussed. Oliver *v.* Davis **C. A. 727**

Barras v. *Aberdeen Steam Trawling and Fishing Co., Ld.* [1933] A. C. 402.
Referred to. The Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell **C. A. 417**

Barrett v. *Hardy Brothers (Alnwick), Ld.* [1925] 2 K. B. 220.
Considered. Wolfe *v.* Hogan **C. A. 194**

Benninga (Mitcham), Ld. v. *Bijstra* [1946] K. B. 58.
Considered. The Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell **C. A. 417**

Blackpool Corporation v. *Locker* [1948] 1 K. B. 349.
Considered. Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts **C. A. 608**

Boy Andrew, The - [1948] A. C. 149
Applied. Davies *v.* Swan Motor Co. (Swansea), Ld. James, Third Party - - - **C. A. 291**

Brain v. *Minister of Pensions* [1947] K. B. 625
Followed. Minister of Pensions *v.* Hornsey - **Ormerod J. 526**

Braithwaite & Co., Ld. v. *Elliot* [1947] K. B. 177.
Followed. The Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell **C. A. 417**

Bunny v. *Hopkinson* (1859) 27 Beav. 565
Considered. Mason *v.* Burningham **C. A. 545**

Burrows v. *Lang* - - - [1901] 2 Ch. 502
Explained. Wright *v.* Macadam **C. A. 744**

Bush v. *Whitehaven Trustees* (1888) 52 J. P. 392.
Followed. Parkinson (Sir Lindsay) & Co., Ld. *v.* Commissioners of His Majesty's Works and Public Buildings - - **C. A. 632**

Caminer and Wife v. *Northern and London Investment Trust, Ld.* [1948] W. N. 489. Reversed - - **C. A. 64**

Carlish v. *East Ham Corporation* [1948] K. B. 380.
Approved. Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts - - **C. A. 608**

Carltona, Ld. v. *Commissioner of Works* [1943] 2 All E. R. 560.
Followed. Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts - - **C. A. 608**

Caswell v. *Powell Duffryn Associated Collieries, Ld.* [1940] A. C. 152.
Followed. Davies *v.* Swan Motor Co. (Swansea), Ld. James, Third Party - - - **C. A. 291**

Commissioners of Customs and Excise v. *Ingram* [1948] 1 All E. R. 927.
Applied. Commissioners of Customs and Excise *v.* Ingram **C. A. 103**

Crears v. *Hunter* - (1887) 19 Q. B. D. 341
Applied. Oliver *v.* Davis **C. A. 727**

Cressy v. *South Metropolitan Water Board* (1906) 94 L. T. 790.
Considered. Rider *v.* Metropolitan Water Board **C. A. 378**

Curl v. *Angelo* - [1948] 2 All E. R. 189
Followed. Wimbush *v.* Cibulia. Wimbush *v.* Levinski **C. A. 564**

Currie v. *Misa* - (1875) L. R. 10 Ex. 153
Discussed. Oliver *v.* Davis **C. A. 727**

Davies v. *Mann* (1842) 10 M. & W. 546
Discussed. Davies *v.* Swan Motor Co. (Swansea), Ld. James, Third Party - **C. A. 291**

Ellerman Lines, Ld. v. *H. & G. Grayson, Ld.* [1919] 2 K. B. 535; [1920] A. C. 475.
Considered. Davies *v.* Swan Motor Co. (Swansea), Ld. James, Third Party - - **C. A. 291**

Epsom Grand Stand Association, Ld. v. *Clarke and Wife* [1919] W. N. 170.
Considered. Wolfe *v.* Hogan **C. A. 194**

Frederick Braby & Co., Ld. v. *Bedwell* [1926] 1 K. B. 456.
Considered. The Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell **C. A. 417**

Gidden v. *Mills* - - [1925] 2 K. B. 713
Considered. Wolfe *v.* Hogan **C. A. 194**

Glossop v. *Ashley* - - [1922] 1 K. B. 1
Distinguished. Edgware Estates, Ld. *v.* Coblentz - **C. A. 717**

Grant v. *Sun Shipping Co., Ld.* [1948] A. C. 563.
Discussed. Davies *v.* Swan Motor Co. (Swansea), Ld. James Third Party - - **C. A. 291**

Griffiths v. *Davies* - - [1943] K. B. 618
Considered. Lazarus-Barlow *v.* Regent Estates Co., Ld. **C. A. 465**

Grove v. *Lloyd's British Testing Co., Ld.* [1931] A. C. 450.
Distinguished. Acton Borough Council *v.* West Middlesex Assessment Committee - **Divl. Ct. 10**

Hadley v. *Baxendale* (1854) 9 Exch. 341
Considered. Victoria Laundry (Windsor), Ld. *v.* Newman Industries, Ld. Coulson & Co., Ld. (Third Parties) - **C. A. 528**

Helman v. *Horsham and Worthing Assessment Committee* [1949] 1 K. B. 62.
Affirmed - - - **C. A. 335**

Higgins v. *Harrison* (1932) 25 B. W. C. C. 113
Applied. Carr *v.* Mercantile Produce Co., Ld. **Divl. Ct. 601**

Howe v. *Smith* - (1884) 27 Ch. D. 89
Applied. Gallagher *v.* Shilcock **Finnemore J. 765**

Indermaur v. *Dames* (1866) L. R. 1 C. P. 274
Applied. Horton *v.* London Graving Dock Co., Ld. **Lynskey J. 584**

International Tea Stores Co. v. *Hobbs* [1903] 2 Ch. 165.
Applied. Wright *v.* Macadam **C. A. 744**

Jackson Stansfield & Sons v. *Butterworth* [1948] 2 All E. R. 558.
Followed. J. Dennis & Co., Ld. *v.* Munn - - - **C. A. 327**

James Macara, Ld. v. *Barclay* [1945] K. B. 148.
Followed. Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts - - **C. A. 608**

Judgment Debtor, In re a (1935) 51 T. L. R. 452.
Applied. Barefoot *v.* Clark **C. A. 97**

Jutson v. *Barrow* - - [1936] 1 K. B. 236
Considered. Younghusband *v.* Luftig - - **Divl. Ct. 354**

Karflex, Ld. v. *Poole* - [1933] 2 K. B. 251
Followed. Warman *v.* Southern Counties Car Finance Corporation, Ld. W. J. Ameris Car Sales (Third Party) **Finnemore J. 576**

King v. *York* - - - [1919] W. N. 59
Considered. Lazarus Barlow *v.* Regent Estates Co., Ld. **C. A. 465**

Lamb Brothers v. *Keeping* [1914] W. N. 225
Applied. Mason *v.* Burningham **C. A. 545**

Lewisham Borough Council v. *Maloney* [1948] 1 K. B. 50.
Followed. Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts - - **C. A. 608**

Lloyd v. *Cook* - - [1929] 1 K. B. 103
Considered. Lazarus Barlow *v.* Regent Estates Co., Ld. **C. A. 465**

Malone v. *Laskey* - [1907] 2 K. B. 141
Applied. Ball *v.* London County Council - - - **C. A. 159**

Mason v. *Mason* - - [1933] P. 199
Applied. James Bibby, Ld. *v.* Woods and Howard **Divl. Ct. 449**

Mayer v. *Burgess* - (1855) 4 E. & B. 655
Distinguished. Mason *v.* Burningham - - - **C. A. 545**

Mercer v. *Graves* - (1872) L. R. 7 Q. B. 499
Applied. James Bibby, Ld. *v.* Woods and Howard **Divl. Ct. 449**

Milne v. *Commissioner of Police for City of London* [1940] A. C. 1.
Followed. Rex *v.* Porter **C. C. A. 128**

Morse v. *Frost* - [1927] 1 K. B. 231
Followed. Nagy *v.* Co-operative Press, Ld. - - **C. A. 188**

Norman v. *Simpson* - [1946] K. B. 158
Considered. Edgware Estates, Ld. *v.* Coblentz - **C. A. 717**

North v. *Holroyd* - (1868) L. R. 3 Ex. 69
Distinguished. Mason *v.* Burningham - - - **C. A. 545**

Palser v. *Grinling* - [1948] A. C. 291
Applied. LAZARUS, BARLOW *v.* REGENT ESTATES CO., LD. **C. A. 465**

Pearce v. *Bolton* - - [1902] 2 K. B. 111
Applied. MASON *v.* BURNINGHAM **C. A. 545**

Pickford v. *Mace* - - [1943] K. B. 623
Followed. HARRIS *v.* ROWLEY **C. A. 697**

Property Holding Co., Ld. v. *Clark* [1948] 1 K. B. 630.
Part not followed. SEAFORD COURT ESTATES LD. *v.* ASHER **C. A. 481**

Reading v. *The King* - [1948] 2 K. B. 268
Affirmed - - - **C. A. 232**

Reg. v. *Button* - - [1900] 2 Q. B. 597
Distinguished. REX *v.* CLUCAS **C. C. A. 226**

Rex v. *Deaville* - - [1903] 1 K. B. 468
Considered to be overruled. REX *v.* PORTER - **C. C. A. 128**

Rex v. *Nicholson* (1947) 32 Cr. App. R. 127
Followed. REX *v.* NEAL **C. C. A. 590**

Rolph v. *Crouch* - (1867) L. R. 3 Ex. 44
Considered. MASON *v.* BURNINGHAM - - - **C. A. 545**

Shippey v. *Grey* - (1880) 49 L. J. (Q. B.) 524
Distinguished. JAMES BIBBY, LD. *v.* WOODS AND HOWARD **Divl. Ct. 449**

Smith and Snipes Hall Farm, Ld. v. *River Douglas Catchment Board* [1948] W. N. 414.
Reversed - - **C. A. 500**

Swadling v. *Cooper* - [1931] A. C. 1
Discussed. DAVIES *v.* SWAN MOTOR CO. (SWANSEA), LD. JAMES, THIRD PARTY - - - **C. A. 291**

Victoria Laundry (Windsor), Ld. v. *Newman Industries, Ld. Coulson & Co., Ld. (Third Parties)* [1948] W. N. 397
Reversed - - **C. A. 528**

Victoria Laundry (Windsor), Ld. v. *Newman Industries, Ld. Coulson & Co., Ld. Third Party* [1949] 2 K. B. 528.
Considered. MASON *v.* BURNINGHAM **C. A. 545**

Volute, The - - - [1922] 1 A. C. 129
Applied. DAVIES *v.* SWAN MOTOR CO. (SWANSEA), LD. JAMES, THIRD PARTY - - - **C. A. 291**

Webb v. *Austin* - (1844) 7 M. & G. 701
Applied. MACKLEY *v.* NUTTING **C. A. 55**

Westminster City Council v. *Southern Railway Co.* [1936] A. C. 511.
Applied. HELMAN *v.* HORSHAM AND WORTHING ASSESSMENT COMMITTEE **C. A. 335**

Williams v. *Smith* - - [1934] 2 K. B. 158
Not followed. LONG EATON CO-OPERATIVE SOCIETY, LD. *v.* SMITH **C. A. 144**

Winchester Court Ld. v. *Miller* [1944] K. B. 734.
Applied. SEAFORD COURT ESTATES, LD. *v.* ASHER - - **C. A. 481**

Wright v. *Howell* - (1947) 204 L. T. J. 299
Followed. WIMBUSH *v.* CIBULIA. WIMBUSH *v.* LEVINSKI **C. A. 564**

Young v. *Bristol Aeroplane Co., Ld.* [1944] K. B. 718.
Referred to. THE ROYAL CROWN DERBY PORCELAIN CO., LD. *v.* RAYMOND RUSSELL **C. A. 417**

Young and Young v. *Otto* [1948] 1 D. L. R. 285 (*CANADA*).
Not followed. MALLETT *v.* DUNN **Hilbery J. 180**

STATUTES JUDICIALLY CONSIDERED

1824

Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4. REX *v.* FAIRBAIRN **C. C. A. 690**

1833

Civil Procedure Act, 1833 (3 & 4 *Wm.* 4, *c.* 42), *ss.* 28 *and* 29. *In re* AN ARBITRATION BETWEEN THE PODAR TRADING CO., LD. BOMBAY AND FRANCOIS TAGHER, BARCELONA **Divl. Ct. 277**

1847

Waterworks Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 17), *s.* 32. RIDER *v.* METROPOLITAN WATER BOARD **C. A. 378**

1853

Betting Act, 1853 (16 & 17 *Vict.*, *c.* 119), *s.* 3. REX *v.* PORTER **C. C. A. 128**

1855

Metropolis Management Act, 1885 (18 & 19 *Vict., c.* 120), *s.* 114. Rider *v.* Metropolitan Water Board **C. A. 378**

1858

Medical Act, 1858 (21 & 22 *Vict., c.* 90) *s.* 40. Younghusband *v.* Luftig **Divl. Ct. 354**

1869

Debtors Act, 1869 (32 & 33 *Vict., c.* 62), *s.* 5. Barefoot *v.* Clark **C. A. 97**

1876

Customs Consolidation Act, 1876 (39 & 40 *Vict., c.* 36), *ss.* 169, 170, 172, 179 *and* 202. Attorney-General *v.* Hunter - **Morris J. 111**

1882

Bills of Exchange Act, 1882 (45 & 46 *Vict., c.* 61), *s.* 27, *sub-s.* 1 (*b*). Oliver *v.* Davis - - - **C. A. 727**

1890

Partnership Act, 1890 (53 & 54 *Vict., c.* 39), *ss.* 14 *and* 36. Tower Cabinet Co., Ld. *v.* Ingram **Divl. Ct. 397**

1893

Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *ss.* 12, 53, *sub-ss.* 1, 2. Mason *v.* Burningham - - **C. A. 545**

—— —— *ss.* 39, 48. Gallagher *v.* Shilcock - - **Finnemore J. 765**

1901

Factory and Workshop Act, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149, *sub-s.* 1. Acton Borough Council *v.* West Middlesex Assessment Committee **Divl. Ct. 10**

1906

Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 27, *sub-s.* 3; *s.* 69, *sub-s.* 3; *s.* 71, *sub-s.* 3. Elcock *v.* Thomson **Morris J. 755**

1916

Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 32, *sub-s.* 1. Rex *v.* Clucas **C. C. A. 226**

1919

Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *sub-s.* 2. Executors of Walter Sampson, decd. *v.* Nottinghamshire County Council **Divl. Ct. 439**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3. Seaford Court Estates, Ld. *v.* Asher **C. A. 481**

—— —— *s.* 5, *sub-s.* 5; *s.* 12, *sub-s.* 1 (*a*); *s.* 15, *sub-s.* 3. Edgware Estates, Ld. *v.* Coblentz - **C. A. 717**

—— —— *s.* 12, *sub-s.* 1 (*g*). Brock *v.* Wollams - - **C. A. 388**

—— —— *s.* 12, *sub-s.* 1 (*g*). Mackley *v.* Nutting - - **C. A. 55**

—— —— *s.* 12, *sub-s.* 2. Wimbush *v.* Cibulia. Wimbush *v.* Levinsky **C. A. 564**

—— —— *s.* 12, *sub-s.* 2. Wolfe *v.* Hogan **C. A. 194**

—— —— *s.* 17, *sub-s.* 2. Wolfe *v.* Hogan **C. A. 194**

1923

Rent and Mortgage Interest Restrictions Act 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 11, *sub-s.* 1. Lazarus-Barlow *v.* Regent Estates Co., Ld. **C. A. 465**

1924

Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5, *c.* 37), *s.* 1, *sub-ss.* 1 *and* 2; *s.* 7, *sub-ss.* 1, 2, 3, 9, 10 *and* 11; *s.* 8, *sub-s.* 1. Long Eaton Co-operative Society, Ld. *v.* Smith - - - **C. A. 144**

1925

Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 62 *and* 295, *sub-s.* 1 (ii). Wright *v.* Macadam - - **C. A. 744**

—— —— *s.* 78, *sub-s.* 1. Smith and Snipes Hall Farm, Ld. *v.* River Douglas Catchment Board **C. A. 500**

Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 33. Rex *v.* H. Sherman, Ld. **C. C. A. 674**

1927

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-s.* 1. Lawrence *v.* Sinclair **C. A. 77**

—— —— *ss.* 4, 5, 17, *sub-ss.* 1, 3. Stuchbery *v.* General Accident Fire and Life Assurance Corporation, Ld. **C. A. 256**

—— —— *s.* 5, *sub-ss.* 1 *and* 2. Rose *v.* Hurst - - - **C. A. 372**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3. Acton Borough Council *v.* West Middlesex Assessment Committee **Divl. Ct. 10**

1930

Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *ss.* 6, 34. Smith and Snipes Hall Farm, Ld. *v.* River Douglas Catchment Board **C. A. 500**

—— —— *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1. Marriage *v.* East Norfolk Rivers Catchment Board **Byrne J. 456**

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35. Marsh *v.* Moores (J.). Marsh *v.* Moores (P.) **Divl. Ct. 208**

1933

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*g*). The Royal Crown Derby Porcelain Co., Ld. *v.* Raymond Russell **C. A. 417**

—— —— *s.* 13. Brock *v.* Wollams **C. A. 388**

—— —— *sch. I., para.* (*g*) (ii). Harris *v.* Rowley - - - **C. A. 697**

Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 1. Rex *v.* H. Sherman, Ld. **C. C. A. 674**

1934

Arbitration Act, 1934 (24 & 25 *Geo.* 5, *c.* 14), *s.* 11. *In re* An Arbitration between the Podar Trading Co., Ld., Bombay, and Francois Tagher Barcelona **Divl. Ct. 277**

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 105. Mason *v.* Burningham - - - **C. A. 545**

Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 3. *In re* An Arbitration between the Podar Trading Co., Ld., Bombay, and Francois Tagher, Barcelona - **Divl. Ct. 277**

1937

Firearms Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2. Rex *v.* Fairbairn - **C. C. A. 690**

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1. Carr *v.* Mercantile Produce Co., Ld. **Divl. Ct. 601**

1938

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1 & 2 *Geo.* 6, *c.* 26), *ss.* 2, 4. Norton *v.* White - - - **C. A. 87**

Finance Act, 1938 (1 & 2 *Geo.* 6, *c.* 46), *ss.* 40, *sub-ss.* 1, 3, 5, 41, *sub-s.* 4 (*e*). Potts' Executors *v.* Inland Revenue Commissioners **C. A. 706**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2; *s.* 23, *sub-s.* 4; *s.* 24, *sub-ss* 1 *and* 2. Jones *v.* Bellgrove Properties, Ld. - **C. A. 700**

—— —— *s.* 21. Marriage *v.* East Norfolk Rivers Catchment Board **Byrne J. 456**

1940

Agricultural Wages (Regulation) Amendment Act, 1940 (3 & 4 *Geo.* 6. *c.* 17), *s.* 1. Long Eaton Co-operative Society, Ld. *v.* Smith **C. A. 144**

Finance (No. 2) Act, 1940 (3 & 4 *Geo.* 6, *c.* 48), *s.* 41, *sub-s.* 1. Commissioners of Customs and Excise *v.* Ingram - - - **C. A. 103**

1943

Pensions Appeal Tribunals Act, 1943 (6 & 7 *Geo.* 6, *c.* 39). Minister of Pensions *v.* Horsey **Ormerod J. 526**

Town and Country Planning (Interim Development) Act, 1943 (6 & 7 *Geo.* 6, *c.* 29), *s.* 7, *sub-ss.* 2 *and* 3. Holmes *v.* Bradfield Rural District Council - - - **Divl. Ct. 1**

1944

Education Act, 1944 (7 & 8 *Geo.* 6, *c.* 31), *s.* 39, *sub-s.* 2 (*a*). Jenkins *v.* Howells - **Divl. Ct. 218**

1945

Law Reform (Contributory Negligence) Act, 1945 (8 & 9 *Geo.* 6, *c.* 28), *s.* 1. Davies *v.* Swan Motor Co. (Swansea), Ld. James, Third Party - - - **C. A. 291**

—— —— *s.* 1, *sub-s.* 1. Mallett *v.* Dunn **Hilbery J. 180**

1946

Finance Act, 1946 (9 & 10 *Geo.* 6, *c.* 64)' *s.* 20, *sub-s.* 3; *s.* 67. COMMISSIONERS OF CUSTOMS AND EXCISE *v.* INGRAM - - **C. A. 103**

1947

Agricultural Wages (Regulation) Act, 1947 (10 & 11 *Geo.* 6, *c.* 15), *s.* 2, *sub-s.* 1. LONG EATON CO-OPERATIVE SOCIETY LD. *v.* SMITH - - **C. A. 144**

Penicillin Act 1947 (10 & 11 *Geo.* 6, *c.* 29), *s.* 1, *sub-s.* 1 (*a*) *and* (*b*). ROBERTS *v.* COOMBS - **Divl. Ct. 221**

Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12, 55, *sch. III.* EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL **Divl. Ct. 439**

Transport Act, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 52, *sub-s.* 1; *s.* 58, *sub-ss.* 3, 4. REX *v.* THE LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA. *Ex parte* B. E. BARRETT, LD. **Divl. Ct. 17**

1948

Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 5. REX *v.* PORTER **C. C. A. 128**

—— *s.* 13; *s.* 14, *sub-ss.* 1, 2; *s.* 15, *sub-s.* 5 (*b*). REX *v.* BROOK **C. C. A. 138**

CANADA

1934

Canada Shipping Act, 1934 (24 & 25 *Geo.* 5, *c.* 44), *s.* 2, 284, *sub-ss.* 1 *and* 3, *and* 573. CANADIAN PACIFIC RAILWAY *v.* GAUD - - - **C. A. 239**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 27, *r.* 11. NAGY *v.* CO-OPERATIVE PRESS, LD. - - **C. A. 188**

—— *Or.* 30, *r.* 1. NAGY *v.* CO-OPERATIVE PRESS, LD. - - **C. A. 188**

—— *Or.* 36, *r.* 1. NAGY *v.* CO-OPERATIVE PRESS, LD. - - **C. A. 188**

—— *Or.* 45, *r.* 5. JAMES BIBBY, LD. *v.* WOODS AND HOWARD **Divl. Ct. 449**

Control of Building Operations (*No.* 8) *Order*, 1947 (*S. R. & O.* 1947, *No.* 74). J. DENNIS & CO., LD. *v.* MUNN **C. A. 327**

Customs General Order, 1895 (*S. R. & O.* 66. 1895). ATTORNEY-GENERAL *v.* HUNTER - - **Morris J. 111**

Defence (*General*) *Regulations*, 1939, *reg.* 51. ERITH CORPORATION *v.* HOLDER **C. A. 46**

Defence Regulations, 1939, *No.* 56A. J. DENNIS & CO., LD. *v.* MUNN **C. A. 327**

ERRATUM

Seaford Court Estates, Ld. v. *Asher* [1949] 2 K. B. 481, p. 485, l. 41. For " where " read " whether."

Page 485, l. 42. For " on " read " or to."

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

HOLMES *v.* BRADFIELD RURAL DISTRICT COUNCIL.

1949
Jan. 20.

Lord Goddard C.J., Humphreys and Finnemore JJ.

Local Government—Town and country planning—Plans prepared for bungalows—Local authority refuse consent to erection—Appeal to Minister of Town and Country Planning—Appeal withdrawn—Local authority give consent—That consent revoked—Erection not commenced—Whether claimant entitled to compensation in respect of expenditure incurred in preparation of plans—Town and Country Planning (Interim Development) Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 29) *s.* 7, *sub-ss.* 2 *and* 3.

Section 7, sub-s. 2, of the Town and Country Planning (Interim Development) Act, 1943, provides that where permission for the development of land is revoked by an order under that Act a person shall be entitled to recover compensation in respect of expenditure incurred before the date of the order "in carrying "out any work which is rendered abortive by the order." By sub-s. 3 expenditure "incurred in the preparation of plans for "the purpose of any work . . . . shall be deemed to be included "in the expenditure incurred in carrying out that work."

The claimant, the owner of certain land, had prepared plans for bungalows to be erected on it, but the local authority refused their consent to their erection. The claimant appealed against that refusal to the Minister of Town and Country Planning, but

1949

HOLMES
v.
BRADFIELD
RURAL
DISTRICT
COUNCIL.

later withdrew that appeal. Subsequently the local authority gave their consent to the erection of the bungalows, but that consent was later revoked by an order made under the Act of 1943. No physical work was ever carried out on the land in question.

Held, (i.) that having regard to sub-s. 3 of s. 7 of the Act of 1943, "work" in sub-s. 2 included the preparation of plans; (ii.) that the claimant was therefore entitled to compensation for the cost of preparation of the plans although no physical work had been carried out; and (iii.) that the fact of his withdrawing his appeal to the Minister did not disentitle him to receive compensation for expenditure incurred on plans before the date of such withdrawal.

CASE STATED by official arbitrator.

The claimant was the freeholder of eleven plots of land within the administrative area of the respondents (hereinafter referred to as "the local authority"), an interim development authority under the Town and Country Planning (Interim Development) Act, 1943.

The following facts were found by the official arbitrator and appeared in the case stated: In September, 1945, the claimant obtained from the local authority consent to the erection of, and did erect, a bungalow on plot 1 and in November, 1945, he applied to the local authority for their consent under the Town and Country Planning Acts, 1932 and 1943, and the Restriction of Ribbon Development Act, 1935, to the erection of ten more bungalows on plots 2 to 11. In December, 1945, the local authority refused their consent, but informed the claimant that they would be prepared to permit the erection of bungalows on plots 2, 3 and 4. In January, 1946, the claimant appealed against that refusal to the Minister of Town and Country Planning and to the Minister of Transport. That appeal was withdrawn by inferred agreement subject to consent being granted for the erection of bungalows on plots 2, 3 and 4, and to the preservation of the claimant's rights to compensation in respect of plots 5 to 11 inclusive. On January 22, 1946, the local authority granted their consent to the erection of bungalows on plots 2, 3 and 4. On March 1, 1946, the claimant wrote to the Minister of Town and Country Planning withdrawing his appeal on the above terms. By letter dated April 27, 1946, the claimant delivered to the local authority a claim for compensation.

On August 23, 1946, the local authority gave their consent to the erection of bungalows on plots 2 to 11 inclusive. On October 15, 1946, the local authority by direction of the

Minister of Town and Country Planning served on the claimant a notice of intention to apply to the Minister for confirmation of an order (under s. 4 of the Town and Country Planning (Interim Development) Act, 1943), revoking the consent of August 23, 1946. On February 4, 1947, a local inquiry was held by the Minister at Reading at which the claimant was represented by certain chartered architects. On November 6, 1946, the claimant renewed his claim for compensation. On June 21, 1947, the Minister confirmed the order of revocation.

The chartered architects referred to had at all material times acted for the claimant in making applications for consent and in negotiations arising therefrom and in connexion with appeals and inquiries. They had also prepared site surveys, and prepared and changed working drawings of the bungalows to be erected on the land. Their remuneration for those services was not specifically agreed between the claimant and his architects, but they were entitled to remuneration under implied contracts entered into when the claimant from time to time orally requested them to act as his professional agents. No expenditure had been incurred by the claimant on works of engineering, road making or building operations in respect of plots 5 to 11.

The claimant claimed 172*l.* from the local authority under s. 7, sub-ss. 2 and 3, of the Town and Country Planning (Interim Development) Act, 1943 (1), as compensation for such of those professional services as were rendered abortive by the order revoking the consent of the local authority to the erection of bungalows on plots 5 to 11. That claim was referred to the official arbitrator.

---

(1) Town and Country Planning (Interim Development) Act, 1943, s. 7, sub-s. 2: "Where any "permission for the development "of land is revoked . . . . by an "order under this Act, then . . . . "if any person has, before the date "of the order, incurred expendi"ture in carrying out any work "which is rendered abortive by "the order, or entered into a "contract for the purpose of any "work which is abandoned by "reason of the order, he shall "be entitled to recover from the "interim development authority "by way of compensation an "amount equal to the expenditure "so incurred or, as the case may "be, to any sums reasonably "paid by him in discharge of any "liability arising under the con"tract in respect of the abandon"ment of that work."

Sub-s. 3: "For the purposes "of this section, any expenditure "incurred in the preparation of "plans for the purpose of any "work, or upon other similar "matters preparatory thereto, "shall be deemed to be included "in the expenditure incurred in "carrying out that work, but "except as aforesaid no compen"sation shall be paid under "sub-s. 2 of this section in respect "of any work carried out before "the date on which the permission "was granted, or in respect of "any liability arising under a "contract made before that date."

The claimant contended (i.) that " work " in sub-s. 2 of s. 7, included professional work and that he was therefore entitled to compensation under sub-s. 2; (ii.) that in any event he was entitled to compensation under sub-s. 3; (iii.) that " any " other matters " in sub-s. 3 included professional services, such as the conduct of appeals and attending inquiries; and (iv.) that the withdrawal of his appeal on March 1, 1946, did not affect his rights.

The local authority contended (i.) that " work " in sub-s. 2 meant physical work and that as the submission of plans was necessary in order to obtain consent to development work, expenditure on them could not become abortive by the subsequent revocation of such consent; (ii.) that as no physical work had been carried out the right to compensation under sub-s. 3 did not arise; and (iii.) that expenditure up to March 1, 1946, was rendered abortive by the claimant's withdrawal of his appeal and not by the revocation of the consent.

The arbitrator stated his award in the form of a special case and left for the decision of the court the questions (i.) whether in sub-s. 2 of s. 7, of the Act of 1943, the words " work which is rendered abortive by the order " included professional work which was so rendered abortive, and (ii.) whether, in the circumstances of the withdrawal on March 1, 1946, by the claimant of his appeal, he was entitled to compensation under sub-s. 2 in respect of work done before that date.

The arbitrator assessed the compensation at 132*l.* if the court decided those questions in the affirmative, and at 42*l.* if they decided question (i.) in the affirmative and question (ii.) in the negative. He determined that no compensation was payable if they decided both questions in the negative.

Kekwick for the claimant. Apart from the meaning of " work," which must, it is submitted, include the plans on which the building work is carried out, the preparation of plans comes within s. 7, sub-s. 2, as expenditure incurred under a " contract for the purpose of any work which is " abandoned by reason of the order " of revocation. The position is made clear by sub-s. 3 which expressly brings in "expenditure incurred in the preparation of plans for the "purpose of any work." The plans were prepared solely for the purposes of the work which had been permitted, and they are rendered useless by the order revoking that permission. The only reasonable construction of the section is to allow compensation for that useless expenditure. As it was incurred solely for the purposes of the permitted work, and is rendered useless because the work cannot be done, it is, surely, immaterial that the actual physical part of the work has not been started.

Squibb for the local authority. It is submitted that the scheme of s. 7, sub-ss. 2 and 3 is this: Sub-s. 2 provides for payment of compensation for "work" rendered abortive by an order revoking the permission granted for the work; "work" means physical work carried out on the ground, and, therefore, does not include the preparation of plans. On the other hand, the sub-section also compensates where the claimant has "entered into a contract for the purpose "of any work which is abandoned by reason of the" revocation. In that case he is entitled to compensation for "any sums "reasonably paid by him in discharge of any liability arising "under the contract in respect of the abandonment of that "work." The architect's plans are not "work" within the meaning of sub-s. 2; neither can the sums paid to the architect be said to have been paid in discharge of a liability in respect of the abandonment. It follows that expenditure on plans is not within this provision for compensation, even though the preparation of the plans may perhaps be regarded in a general sense as part of the work.

[LORD GODDARD C.J. The preparation of plans is an integral part of the work. How can you have a building without plans?]

They are an integral part of the work if there has been any work. But if there has been no "work" within the meaning of the sub-section, there is no basis on which compensation can be claimed for the plans. Once physical work has begun on the site, however, the preparation of the plans is part of it and the expenditure incurred in it can be made part of the claim.

[LORD GODDARD C.J. Where do you find that?]

It is implicit in sub-s. 2. The claimant has to bring himself within that sub-section first, under either head. Once he has succeeded in doing that, he is entitled under s. 7, sub-s. 3, to compensation for his plans. The object of that sub-section is merely to save the cost of plans from the exclusion of any work done before development permission was granted.

The preparation of plans before March 1, 1946, was not rendered abortive by the revocation order but by the refusal of the local authority, in December 1945, to permit the work, and by the withdrawal, by the claimant, of his appeal on March 1. He is not therefore entitled to compensation for the cost of those plans in any event.

Kekwick was not called on to reply.

FINNEMORE J. Under the Town and Country Planning Act, 1932, if a person proceeded to build a house on land in an area with respect to which a resolution had been passed to adopt a scheme, or in areas where a scheme was already operative, he did so at his own risk, and the planning authority might stop him before the house was built, or while it was being built. On the other hand, he could obtain permission. If he did so, the authority could still revoke that permission. In those circumstances, subject to certain provisions, the builder was entitled to obtain compensation. Under the Town and Country Planning (Interim Development) Act, 1943, the position was somewhat the same as under the Act of 1932, but the Act of 1943 applied to the whole of the country, which was put, as it were, under a notional town-planning scheme.

By s. 7, sub-s. 2, of the Act of 1943, where permission for the development of land is revoked by an order under that Act a person is entitled to recover compensation in respect of "work" rendered abortive by that order. The question at issue in the present case is: "What is the meaning "of 'work' in that sub-section?" In sub-s. 1 of s. 7 and in most other provisions in the Acts of 1932 and 1943 where that word is used, it is used with the word "buildings," and so refers to the actual building of some kind of work on the site. That seems to show that "work" does not prima facie include professional services such as those which are involved in the preparation of plans. Sub-section 2 of s. 7 entitles to compensation, however, not only persons who have incurred expenditure in carrying out work rendered abortive by a revocation order, but also those who have entered into a contract for any work abandoned by reason of such an order. Moreover, by sub-s. 3 of s. 7, where special provision is made for the very matter in issue, expenditure incurred in the preparation of plans for the purpose of any work " shall " be deemed to be included in the expenditure incurred in " carrying out that work."

It was argued for the claimant that the professional charges which he had to pay came within the terms of a contract for the purpose of any work which was abandoned. Plainly they come within the words of sub-s. 3 of s. 7 as " expenditure " incurred in the preparation of plans for the purpose of any " work, or upon other similar matters preparatory thereto " and it was argued that that sub-section states in plain terms that such expenditure was to be deemed to be included in the expenditure incurred in carrying out the work. The claimant argued that he had those plans prepared ; that he obtained permission to carry out the work ; that an order was made which revoked that permission ; and that he was therefore entitled to be compensated for that expenditure because it was to be deemed to be included in the expenditure incurred in carrying out the work.

The argument for the local authority was that it was only if a brick was laid or a sod was turned, if some kind of physical work was done on the site, that the expenditure incurred in making the plans for that work could be added to the cost of that work. If the order revoking the permission was made before the claimant had actually done any work on the land, then, although he had prepared the plans, he could not be compensated for them because the cost of the plans could not then be included in the expenditure on physical work which had not been carried out.

That argument leads to an unfortunate and, as it seems to this court, a really absurd position. A man who has prepared plans and done merely an hour's work on the site is entitled to compensation for the preparation of those plans : another man who has had similar plans prepared but has not actually begun the work on the site, although he has incurred the same expenditure for the same purpose and is stopped by the same order of revocation, is not entitled to include the cost of the plans in what is called " the expenditure incurred " in carrying out that work." Of course the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things. There is nothing grammatically wrong in making the words "shall be deemed to be included "in the expenditure incurred in carrying out that work" apply to expenditure on plans even though no physical work was carried out. The sub-section does not state that expenditure on plans is necessarily to be added to something else, or that it can only be included in the expenditure for which compensation is claimed if there are other items to be included with it. Expenditure has been incurred in carrying out the work; part of that expenditure is the cost of the preparation of plans and, in the opinion of the court, the reasonable interpretation of sub-s. 3, of s. 7 is that if a person prepares plans for the purpose of carrying out work for which permission has been given, and that permission is revoked, the expenditure incurred on those plans is deemed to be expenditure incurred in carrying out the work. The answer to question (i.) left by the official arbitrator is therefore that such services should be included within the term "work" having regard to s. 7, sub-ss. 2 and 3, of the Act of 1943.

The second question is whether the expenditure on plans before March 1, 1946, when the claimant withdrew his appeal against the refusal of December, 1945, should be considered as being rendered abortive by the revocation on June 21, 1947, of the permission of August 23, 1946. The argument for the local authority on that point was that the claimant incurred expenditure in the preparation of plans and did not succeed in obtaining permission for the work and that, thus far, he had no grievance; that, having appealed against the refusal, he abandoned the appeal, and that up to that point, again, he had no grievance, and, apparently, no right to compensation; that after he had withdrawn the appeal he obtained permission for the same buildings on the same sites according to the same plans, and that it was that permission given in August, 1946, which was subsequently revoked by the Minister. The claimant said in effect that, following that second permission, he had to prepare plans and was entitled to do so, and, that if our view on question (i.) is right, he was entitled to include the cost of preparing those plans as matter of compensation. He had already had the plans prepared before March 1, and sub-s. 3 of s. 7 applied to plans which had been prepared before the date of the permission. That being so, there seems to be no reason why he cannot include the cost of plans for work for which permission was granted in August, 1946, but subsequently revoked as expenditure incurred in carrying out the work. The argument for the authority means, in effect, that, because the claimant had produced those plans before March, 1946, because he had withdrawn his appeal in respect of the work for which those plans were prepared, the plans have in effect ceased to exist and no further regard must be paid to them. But later the claimant was in fact given permission for work to proceed according to those plans, and they then became plans which he had prepared for the purpose of carrying out that work. It was for the work which was made abortive by the subsequent revocation, work for which the claimant was granted permission in August, that he had had the plans prepared, and he is, in our opinion, entitled to include the cost of them in the matters of compensation. In our view therefore the answer to question (ii.) is also "Yes." The claimant is therefore entitled to 132*l*., the sum which the official arbitrator awarded if both questions were answered favourably to the claimant.

LORD GODDARD C.J. I agree. The official arbitrator has used the expression "professional work" in the two questions for the court. To prevent any question arising hereafter, I desire to say that the argument in this case has been confined to the preparation of plans, and it is only to such work that this judgment is intended to refer. It does not concern any other kind of professional work, as to which no question has been raised in the arguments.

HUMPHREYS J. I agree.

Declaration accordingly.

Solicitors for claimant: *Whitelock & Storr.*

Solicitors for local authority: *Layton & Co., for Collins, Dryland & Thorowgood, Reading.*

R. P. C.

1949
Jan. 26.

Lord Goddard C.J., Humphreys and Finnemore JJ.

ACTON BOROUGH COUNCIL *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE AND ANOTHER.

Rating—Derating—"Industrial" hereditament—"Factory"—Propeller testing station—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44) *s.* 3*—Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22) *s.* 149, *sub-s.* 1.

A company which manufactured propellers for sale to the Ministry of Supply occupied a hereditament where they (the company) tested the propellers. The component parts of the propellers, having been manufactured by the company elsewhere, were assembled on that hereditament before testing. Propellers showing faults on test were not scrapped but were adjusted or modified either there or, in the case of more serious faults, elsewhere.

Held, that that hereditament was an "industrial hereditament" within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, read with s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, because the testing of the propellers was incidental to their manufacture.

Grove v. *Lloyd's British Testing Co. Ld.*, [1931] A. C. 450, distinguished.

CASE STATED by consent of parties.

Premises were occupied by the second respondents, De Havilland Propellers, Ld., for the purpose of testing propellers the bulk of which they had manufactured for sale to the Ministry of Supply.

The company made a proposal for the amendment of the valuation list on the ground that that testing station was an "industrial hereditament" within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928 (1).

---

(1) Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1: "In this Act "the expression 'industrial "'hereditament' means a "hereditament . . . . occupied "and used . . . . subject as "hereinafter provided, as a factory "or workshop: Provided that "the expression industrial "hereditament does not include "a hereditament occupied and "used as a factory or workshop "if it is primarily occupied and "used for . . . . (*f*) any . . . . "purposes . . . . which are not "those of a factory or workshop." Sub-s. 2 provides that for the purposes of the Act (with certain immaterial exceptions) the expressions "factory" and "workshop" have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920.

Section 149, sub-s. 1, of the Factory and Workshop Act, 1901, defines "non-textile factory" as (inter alia) "(*c*) any premises "wherein . . . . any manual labour "is exercised by way of trade "or for purposes of gain in or

The rating authority objected to that proposal. The assessment committee heard the proposal and objection and decided to amend the list as proposed by the company.

By an order made by Birkett J. with the parties' consent a special case was stated upon the question whether the testing station was an "industrial hereditament."

The following facts were stated in the special case: 8. The hereditament in question consists of a portion of premises erected by the Ministry of Supply as an aero-engine testing station . . . . 9. The hereditament is occupied by the respondent company for the purpose of testing propellers under conditions as like as possible to those of flight. 10. The testing carried on in the hereditament falls into three main categories: (i.) The testing of prototype propellers intended to be used in connexion with a new or modified type of aircraft. These experiments continue until a type of propeller is judged perfect for this particular need and ready to be put into production. (ii.) Testing of propellers already in regular production prior to their delivery under contract for sale to the Ministry of Supply. (iii.) Testing necessitated by failures or faults in propellers occurring during operational flights.

11. The tests described in para. 10 (i.) and (iii.) are not directly connected with production, but are in the nature of research. The bulk of the testing however is in connexion with production tests as described in 10 (ii.) and the hereditament is primarily occupied in connexion with tests of this category.

12. The component parts of the propellers are manufactured in other premises occupied by the respondent company and are sent to the hereditament to be tested. On arrival the components are assembled and prepared for test in that part of the hereditament . . . . where also are installed the aero-engines to which the propellers have to be attached to drive the propeller during the test. These aero-engines have to be mounted on test beds in the test cells [in the hereditament], and in addition to fitting on the propeller there has to be fitted certain piping and electrical wiring. Manual labour is involved

" incidental to any of the following " purposes—namely: (i.) the " making of any article or of part " of any article; or (ii.) the " altering repairing, ornamenting, " or finishing of any article; or " (iii.) the adapting for sale of " any article, and wherein . . . . " steam, water or other mechanical " power is used in aid of the " manufacturing process carried " on there."

in the whole of the foregoing procedure and in the subsequent dismantling of the propellers, engines and ancilliary equipment after testing.

13. The majority of the propellers manufactured by the respondent company are made to the order of the Ministry of Supply which makes it a condition of their contract that all propellers shall be tested before delivery. Accordingly, while such propellers are manufactured elsewhere, they are brought to the hereditament for testing as described in para. 10 (ii.).

14. Where a propeller shows faults on test, it is not scrapped but is, dependent on the extent of such faults, dealt with either by minor adjustments or modifications which are made on the hereditament, or, in case of more serious faults, by returning it to premises of the respondent company elsewhere to enable such alterations or modifications to be made as the test has shown to be necessary, after which the propeller is returned to the hereditament, where it is submitted to a further test.

Rowe K.C. and *Squibb* for the rating authority. The propeller testing station is not an industrial hereditament for two reasons: (i.) it is not a factory within the meaning of s. 149, sub-s. 1, of the Factory and Workshop Act, 1901; (ii.) the purposes for which it is primarily occupied and used are not the purposes of a factory. It follows, on either ground, that the hereditament is not an industrial hereditament within the definition in s. 3 of the Rating and Valuation (Apportionment) Act, 1928. The present case is on all fours with *Grove* v. *Lloyd's British Testing Co. Ld.* (1), in which it was held that a cable testing station was not a factory. It is true that in the present case the owners of the propeller testing station manufactured propellers on other premises. But the unit for rating is the hereditament, not the business, and one must only look at what is done on the hereditament; per Lord Greene M.R. in *James A. Jobling & Co. Ld.* v. *Sunderland County Borough Assessment Committee* (2). A station where propellers are tested is not a factory, and the testing of propellers is not a factory purpose.

Scott Henderson K.C. and *Ramsay Willis* for the company. The present case is distinguishable from *Grove* v. *Lloyd's British Testing Co. Ld.* (1) in four respects. In the present case (i.) the component parts of the propellers are assembled on the hereditament; (ii.) the testing is carried out by the

(1) [1931] A. C. 450.

(2) (1944) 60 T. L. R. 330, 331.

manufacturers; (iii.) after testing alterations are made for the purpose of making the propellers fit for sale; (iv.) none are rejected. Having regard to those facts the hereditament (i.) is a factory, and (ii.) is used primarily for factory purposes. The assembly of the component parts is an adapting of them for sale, just as the sorting of eggs is an adapting for sale. The testing by a manufacturer of an article which he has manufactured with a view to carrying out alterations is part of the process of manufacture. It is to be contrasted with testing by another party with a view either to rejecting an article if it is not up to standard, or to putting a hall-mark on it if it is. That was the position in *Grove* v. *Lloyd's British Testing Co. Ld.* (1).

Ramsay Willis and *W. L. Roots* for the assessment committee.

Rowe K.C. replied.

LORD GODDARD C.J. This case is not free from difficulty and it is possible that a higher tribunal may take a different view to that which commends itself to me. Mr. Michael Rowe cited Lord Dunedin's speech in *Grove* v. *Lloyd's British Testing Co. Ld.* (2). I thought at first that the present case was covered by that case, but Mr. Scott Henderson's argument has convinced me that I ought to hold that it is not, and that the hereditament now in question is an industrial hereditament.

In *Grove* v. *Lloyd's British Testing Co. Ld.* (2), a testing station was held not to be an industrial hereditament. But there seems to me to be a distinction between that case and the present one. There, cable manufacturers, having made their cables, had to send them to another company, Lloyd's British Testing Co. Ld., to obtain certificates that each cable had a certain stipulated strength. In the words of Lord Hewart C.J., when that case was before the Divisional Court (sub nomine *Dudley, Revenue Officer* v. *Lloyd's British Testing Co. Ld.*) (3), the testing company's task was "not to adapt the cables for "sale, but to see that they have been so adapted." In the present case I think that the testing which was carried out at the propeller testing station was all part of the process of manufacture, or was incidental to the process of manufacture, because it seems to me that, if a manufacturer has to make an article to answer a certain specification, it is essential that he shall, and every manufacturer would, take steps

(1) [1931] A. C. 450.

(2) Ibid. 466.

(3) (1930) 46 T. L. R. 428, 432.

in the course of his manufacture to see that the particular parts of the article, and the article itself when finished, will answer that particular specification, and, if they do not, he will not let them go out from his factory. I think that distinguishes the present case from the case where a manufacturer, having presumably satisfied himself, sends an article to somebody else who has merely then to say whether or not the article does answer the particular requirement and, if so, to give a hall-mark to it, and not to do any work on it himself if it does not. In the present case, in fact, the company were bound to test their propellers by their contract with the Ministry of Supply, but I do not base my judgment on that ground.

I agree, therefore, with the decision of the assessment committee and I think that the case should be answered in favour of the company.

FINNEMORE J. I have come to the same conclusion. I agree with my Lord that this point, which is a short one, is one of difficulty. It depends entirely on the interpretation which is to be given to s. 3, of the Rating and Valuation (Apportionment) Act, 1928, by which, subject to certain exceptions, the expression "industrial hereditament" has the same meaning, in that Act, as that of a "factory" or "workshop" in the Factory and Workshop Acts, 1901 to 1920, read with s. 149, sub-s. 1, of the Factory and Workshop Act, 1901. The effect of s. 3, sub-s. 1 (*f*) of the Act of 1928 is that one may have a "factory" or "workshop" within the meaning of the Factory and Workshop Acts which is primarily occupied and used for purposes which are not those of a factory or workshop, and that such a hereditament is excluded from the phrase "industrial hereditament." If the propeller testing station is a "factory" or "workshop" within the meaning of the Factory and Workshop Acts it must be a "non-textile factory" within para. (*c*) of the definition in s. 149, sub-s. 1, of the Act of 1901. It was a hereditament used for the purpose of testing aeroplane propellers made by the company and, in the main, it was for the testing of propellers already in regular production before their delivery under a contract of sale to the Ministry of Supply.

Mr. Michael Rowe took two points. He said, first, that the station was not a factory or workshop and, secondly, that even if it was a factory or workshop it was primarily used for a purpose which was not that of a factory or workshop. I think that his two points really come to one because his case was that this hereditament was used solely for testing; it was not used for the manufacture or for the adapting for sale of any article. It should be remembered, as was said by Lord Greene M.R., in *James A. Jobling & Co. Ld.* v. *Sunderland County Borough Assessment Committee* (1), that: "The unit "for rating is not the business, but the hereditament, and you "have to find out what is being done in the hereditament "with which the rating authorities are dealing." What the company may have been doing elsewhere has, therefore, nothing to do with the present case. The question on which the decision of this case depends is: "What was being done "in this particular hereditament?" Mr. Michael Rowe said that all that was being done there was the testing of propellers, and that that was not the purpose of a factory: nor was it incidental to the making of any article or to the adapting of it for sale. Mr. Scott Henderson pointed out that the component parts of the propellers came unassembled to the testing station where they were assembled and that any modifications necessary, if they were not serious modifications, were made at that hereditament. Although, of course, the purpose for which the hereditament was used was that of testing, it was not merely for passing or rejecting work which had been done. The testing was an essential part of the manufacture which any prudent manufacturer would have had done before saying: "This article is now manufactured "and is ready for sale."

The great difficulty in the way of the finding of the assessment committee is the decision in *Grove* v. *Lloyd's British Testing Co. Ld.* (2). That was a case in which cables were sent to a cable testing company for the purpose of being tested and of either being passed or rejected and, if they were passed, for the purpose of having certificates issued without which they could not have been sold at all. It was argued in that case that that testing was the adapting for sale of the cables. Lord Dunedin in his speech (3), in which all the members of the House of Lords concurred, said 'No," and that all that the cable testing company did in that case was to test. Assuming that they found any defect they did nothing to put it right; all they did was to say "Aye" or "No," that a cable

(1) (1944) 60 T. L. R. 330, 331.
(2) [1931] A. C. 450.
(3) Ibid. 466.

made by somebody else was fit for a certificate or that it was not. In the present case we are concerned with a company who are manufacturing certain articles—namely, aeroplane propellers. In the course of making those articles they test them, and one imagines that every prudent manufacturer who has to make important articles would test them from time to time. They have a special hereditament for the purpose of testing. In that hereditament they assemble the component parts of the propellers for testing and, having tested them, they dismantle them from the engines and, it may be (para. 12 of the case stated is not clear on this point) that they take them to pieces again completely, and send them back to one of their other factories where the whole of the engine is finally made up. If they find that things are wrong, they put them right, if possible, in that actual hereditament. If they cannot be put right there, then the defective article is sent to one of the other factories to be put right. Those facts seem to me to be quite different from those in *Grove* v. *Lloyd's British Testing Co. Ld.* (1). In that case the testing company were concerned with nothing other than testing. In the present case the company were concerned both with testing and with putting right any defects which they might find.

I think the present case can be put on two grounds. It can be said, first, that the testing was incidental to the adapting for sale of the propellers. Of course that does not mean that each propeller must be altered on testing. If it were already right, there would be nothing to be done, but I should have thought it was incidental to putting it right for the manufacturers to make sure that it was right. But, secondly, I think it is sufficient here to say that, in the present case, the testing, as it was done by the company, was incidental to the making of the propellers; it was a normal process which manufacturers would apply to the manufacture of those articles. They did not test them just to see whether they were ready to be sold; they tested them as part of their manufacture to make sure that they were manufacturing them properly, in accordance with the contract and in accordance with the obligations which the Sale of Goods Act, 1893, places on all manufacturers.

For those reasons I think that the present case is different from that of *Grove* v. *Lloyd's British Testing Co. Ld.* (1), and that the hereditament in the present case was rightly found to be an industrial hereditament.

(1) [1931] A. C. 450.

1949

ACTON BOROUGH COUNCIL *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE.

HUMPHREYS J. I asked Finnemore J. to give his judgment before I expressed any views of my own because I have felt, and still feel, the most profound difficulty in deciding this question, which, I think, turns on very fine distinctions and might well be decided either way, but having heard the judgments of my Lord and of Finnemore J., I say this, that at least I cannot differ from them.

LORD GODDARD C.J. The judgment of the Court is that the hereditament is an industrial hereditament.

Judgment accordingly.

Solicitor for rating authority: *Town Clerk, Acton.*
Solicitors for company: *Blundell, Baker & Co.*
Solicitor for assessment committee: *H. G. Greenwood.*

R. P. C.

REX *v.* THE LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA *Ex parte* B. E. BARRETT LD.

1949
Mar. 2, 3.

Lord Goddard C.J., Humphreys and Birkett JJ.

Road traffic—Goods vehicles—Licensing authority—Application by holders of a public carrier's " A " licence to change operating centre—Refusal—Mandamus—Transport Act, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 52, *sub-s.* 1; *s.* 58, *sub-ss.* 3, 4.

The applicants were holders of a public carrier's " A " licence in respect of certain goods vehicles. On September 27, 1948, they applied under s. 58, sub-s. 4, of the Transport Act, 1947, to the authority to specify London Colney as their operating centre for those vehicles in their former operating centre in Luton. The licensing authority refused the application on the grounds that the applicants' representations should have been presented to the Transport Commission on an application under s. 52, sub-s. 1.

Held, (1.) that s. 52, sub-s. 1, and s. 58, sub-s. 4, of the Transport Act, 1947, were not alternative sections available to carriers to obtain the same result, but were two distinct sections empowering two distinct authorities to consider entirely different sets of circumstances; (2.) that the licensing authority in refusing application had not declined jurisdiction under s. 58, sub-s. 4, but had considered and taken into account other sections of the Act, and especially the prohibition, contained in s. 52, against goods being carried more than 25 miles from the operating centre.

Per curiam. On an application for an order of mandamus or

1949

Rex
v.
The
Licensing
Authority
for
Goods
Vehicles
for the
Metropolitan
Traffic
Area.
Ex parte
B. E.
Barrett
Ld.

certiorari, affidavit evidence is not admissible to explain that the tribunal meant something different from what it said.

Application for an order of mandamus directing the goods vehicles licensing authority for the metropolitan traffic area to hear an application which the applicants had made to him. The applicants were holders of a public carrier's A licence in respect of certain goods vehicles. On September 27, 1948, they applied under s. 58, sub-s. 4 (1) of the Transport Act, 1947, to the authority to specify London Colney as their operating base for those vehicles in their former operating centre in Luton.

The licensing authority, in giving his decision, observed that an application for a change of operating centre under s. 58, sub-s. 3 or 4 was left by the Act entirely to the discretion of the licensing authority, against whose decision there was no appeal; and that similarly, under s. 52, sub-s. 1, the grant

(1) Transport Act, 1947, s. 52, sub-s. 1: "On and after the appointed day, it shall be a condition of every A licence and every B licence that, except under and in accordance with a permit granted by the Commission, goods shall not be carried for hire or reward in any authorized vehicle if the vehicle, at any time while the goods are being so carried, is more than twenty-five miles from its operating centre, and the Road and Rail Traffic Act, 1933, shall have effect as if the said condition were included among the conditions specified in subsection (1) of section eight of that Act."

Section 58, sub-s. 1: "Subject to the provisions of this section, in this part of this Act, the expression 'operating centre' means, in relation to a vehicle authorized to be used under an A licence or a B licence, the premises specified in the application for the licence as the permanent base or centre from which it is intended that the vehicle will normally be used for the purposes of carrying goods for hire or reward."

Sub-s. 3. "On an application after the passing of this Act for an A licence or a B licence, the applicant may, if he thinks fit, request the licensing authority to whom the application is made to specify a point in the area of the authority which is to be treated as the operating centre of the authorized vehicles, and where such a request is made, the licensing authority, may, if he thinks fit, specify as the operating centre for all or any of the authorized vehicles any such point in his area as he thinks fit."

Sub-s. 4. "Where an A licence or B licence is in force at the passing of this Act, the holder of the licence may, within the prescribed time, make such a request as is specified in subsection (3) of this section to the licensing authority by whom the licence was granted, and that subsection shall, with the necessary modifications, apply accordingly."

or refusal of a permit to carry goods for reward outside a radial distance of 25 miles was a matter for the discretion of the British Transport Commission, against whose decision there was no appeal. Having considered the applicants' request to him to fix a notional operating centre at London Colney for their fleet of vehicles so that they might be enabled to continue carrying the traffic on which they had been engaged for many years, the authority was of opinion that the applicants' representations should be presented to the Transport Commission on an application under s. 52, sub-s. 1. He did not think that a person wanting to carry goods for reward beyond a radius of 25 miles from his operating centre should seek to achieve his object by an application to the licensing authority to fix a notional operating centre under s. 58, sub-s. 3 or 4. He was of opinion that to grant the application would have the effect of defeating the clear intention of the Act of 1947, and he therefore refused it.

Sir David Maxwell Fyfe K.C. and *David Karmel* for the applicants. Operating centre is defined in s. 58, sub-s. 1, of the Act, and what has to be considered under sub-ss. 3 and 4 of that section is a geographical point which has to be used as an operating centre. Parliament has said that the licensing authority shall have a discretion, and a safety valve is inserted in the Act to permit licensing authorities to deal with hard cases. Section 39, sub-ss. 1 and 2 show the basis on which nationalization of road transport took place, defining what is long-distance and what is not long-distance transport. There is nothing in the Act that weights the scale in favour of making this type of application under s. 52. If a haulier is desirous of operating his vehicles more than 25 miles from the operating centre, then s. 52 is the relevant section under which application should be made. It is about that which the applicants complain. They are not asking for any long-distance permit, they are satisfied to work within forty miles. They wish to apply under s. 58, sub-ss. 3 and 4 of which were specifically inserted to give authority in suitable cases. The licensing authority read into the Act an intention and interpreted discretion as to which cases he should hear. He has no such discretionary powers. There are two methods by which applications of this nature may be made, either under s. 52 or under s. 58. If brought under s. 58, the licensing authority must hear the application on its merits. There is

1949

REX
v.
THE
LICENSING
AUTHORITY
FOR
GOODS
VEHICLES
FOR THE
METRO-
POLITAN
TRAFFIC
AREA.
Ex parte
B. E.
BARRETT
LD.

nothing in Part III of the Act to indicate any limitations to the discretion which may be exercised by the licensing authority and nothing to indicate that the legislature intended his discretion to be limited. A judge may have to interpret a statute, but he may not regard himself as a subsidiary legislature and add words to the Act or take from the Act what is clearly stated in the Act. That is precisely what has been done here. The decision should have been given on merits and not based on the misconception that the application should have been brought under s. 52 and not under s. 58. Parliament authorized application to tribunal and should tribunal not consider it then they are declining jurisdiction. They referred to *Rex* v. *Ludlow* (1), and *Rex* v. *Port of London Authority* (2).

Sir Frank Soskice S.-G. and *H. L. Parker* for the respondent. What has to be established before a writ of mandamus must issue ? It is old established law that the mere fact that a tribunal misconstrues a statute is not a ground on which such a writ may issue. They referred to *Rex* v. *Port of London Authority* (2) and *Reg.* v. *Cotham* (3). In cases of the kind now under consideration, although there is no obligation on the applicant to apply under s. 52, the legislature clearly intended that such applications should be made under that section. The nature of the evidence adduced before the licensing authority satisfied him that the applicants' request was not of a type that he should assent to under s. 58, and in the exercise of his discretion he refused to grant it. It was open to the licensing authority to approach the exercise of his discretion in a narrow or a broad way. In this case he preferred the narrow approach because the evidence satisfied him that the specification of a notional operating centre would be fractious and serve merely to save the applicants from the need to apply to the Transport Commission for a permit under s. 52. He was right, but even if he were wrong this court should not interfere unless he declined jurisdiction, which he did not. He exercised his discretion even though he took the narrow view of its scope.

Sir Valentine Holmes K.C. and *F. A. Stockdale* for the Railway Executive and Road Transport Executive. Every word of the decision of the licensing authority is correct. Section 52 and s. 58 are not alternatives at all. The Commission when

(1) [1947] K. B. 634.
(2) [1919] 1 K. B. 176.
(3) [1898] 1 Q. B. 802.

considering whether it will grant a permit under s. 52 has to take into consideration entirely different matters from that which the licensing authority is either bound or entitled to take when considering an application under s. 58. To understand the broad scheme of the Act, ss. 52—55 must be read as they deal with the type of undertaking in this case. It is not sufficient to read s. 52, sub-s. 1, alone. Section 54 is most important. This is the section which gives the Commission control over undertakings engaged in long-distance work and provides for compensation. The purpose of s. 58 is to enable licensing authorities to deal with hard or fringe cases and not to excuse hauliers from making application under s. 52. The licensing authority was entitled to think that most of the applicants' representations and evidence were irrelevant to a request under s. 58 because he took the view that that section is not in the Act to enable a haulier to escape from making application for a permit under s. 52. It is there so that licensing authorities may consider whether or not to allow hauliers to change their operating centre. The licensing authority was right in his approach but it does not matter whether he was right or wrong or whether he took into consideration right things or wrong things. He manifestly did not refuse to deal with the applicants' request. In the exercise of his discretion he refused it.

Lord Goddard C.J. In this case Sir David Maxwell Fyfe obtained leave to move for an order of mandamus directed to the licensing authority for the metropolitan area under the Road and Rail Traffic Act of 1933 and the Transport Act of 1947. The grounds on which the mandamus was sought were, that the licensing authority declined jurisdiction by holding that, whatever the merits of the applicants' case might be, the application ought, on the proper construction of the Transport Act, 1947, to have been made to the British Transport Commission under s. 52, and not to the licensing authority under s. 58 of the Transport Act, 1947, and, secondly, that he arrived at his conclusion without having any, or any proper regard to the applicants' evidence, or to the merits of the applicants' case.

Before dealing with the particular facts of this case, I desire to make two observations of a general character, in view of some of the arguments that were addressed to us. The first is that it is a fundamental rule of this court that they will

1949

REX
v.
THE LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA.
Ex parte B. E. BARRETT LD.

Lord Goddard C.J.

not, either by a process of certiorari or mandamus, presume to act as a Court of Appeal by means of either of those two proceedings. For a certiorari, where jurisdiction is in question, the court must be satisfied that there was either an absence of jurisdiction or an excess of jurisdiction, and to allow an order of mandamus to go there must be a refusal to exercise the jurisdiction. The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between finding that a litigant has not made out a case, and refusing to consider whether there is a case. Though the line is a fine one, the court can generally distinguish between the two, and it must depend upon the facts of each particular case. The second observation is that, where a tribunal, of whatever nature, has given a decision and expressed it in language from which the court can ascertain what the decision was, the court will not accept affidavit evidence to say that the tribunal meant something different from that which it said in its judgment. If there is an ambiguity, as sometimes happens, in a decision which is given, the court can send it back, as not infrequently it does in a case stated by magistrates, in order to clear up the ambiguity and to ascertain exactly what the magistrates meant; but, where the language of the tribunal, in which it expressed its judgment, is clear and there is no ambiguity, it would be quite wrong for this court to entertain affidavit evidence or other matter to try to explain that the tribunal, whether it is justices or any other tribunal, meant something different from what it said. In our opinion to do so would open up a very undesirable line of argument, because it might necessitate conflicting affidavits on such a matter. The litigants, who hear the decision given, have to decide from what the tribunal says, whether they have a right to come to this court or not. When they do come to this court, this court can only look at what the tribunal says, and cannot entertain affidavits (I am not saying that they went the whole way in this case) which would suggest that the tribunal meant something different from what it has said.

The two sections of the Transport Act of 1947 which we have to consider are ss. 52 and 58. [His Lordship read ss. 52 and 58 and continued:] To deal briefly with the facts of the case, an A licence was in force in respect of the applicants' vehicles. Both an A licence and a B licence are licences granted under the Road and Rail Traffic Act, the only difference between them being that an A licence is a licence granted to a public carrier, and a B licence is one which is granted to a person who desires to carry his own goods. The applicants carried on business at Luton and, as holders of an A licence their vehicles would be able to travel a distance of 25 miles in any direction from Luton. Luton, in other words, would be the centre of the circle within which they were entitled to operate, with a radius of 25 miles. They desired to carry goods a greater distance than 25 miles in one direction, and for this reason, that the circumference of the circle which they were entitled to travel to the south just takes in the northern suburbs of London; it takes in Willesden and Highgate, but it goes no farther south. No doubt, therefore, it would be a great convenience to their customers and to themselves, if they were able to carry the goods more than 25 miles from Luton—it may be only a few miles more—so that they could carry their goods into the City of London or more into the centre of London than they can at the present time. They therefore went before the licensing authority for the metropolitan area, and asked to have their operating centre moved from Luton to London Colney which is much nearer London. If, therefore, their operating centre was fixed as London Colney instead of Luton, it would enable them to run their vehicles into any part of London that they might so desire.

The real basis of Sir David Maxwell Fyfe's argument has been that ss. 52 and 58 are alternative sections and that a person who desires to achieve the object which the applicants had in this case, can make an application, either to the British Transport Commission for permission to run more than 25 miles or to the licensing authority to alter their operating centre, so as to enable them to run 25 miles from that operating centre, which would perhaps achieve the same result as if they had made an application to the Commission for permission to go more than 25 miles. It will be seen that the two bodies are not the same. To operate one's vehicle for a greater distance than 25 miles, permission has to be obtained from the British Transport Commission. To change the operating centre permission has to be obtained from another authority known as the licensing authority, and, when the Act is considered carefully, I think that the argument submitted by Sir Valentine Holmes, that these two sections are not alternative, is right. They deal with two different things.

"The operating centre," on my reading of s. 58, sub-s. 1, means, in relation to a vehicle, the premises specified in the application for the licence as the permanent base or centre from which it is intended that the vehicle will normally be used for the purpose of carrying goods for hire or reward. "Operating centre" means, if one may use one's own words, the centre from which the vehicles are to be operated. One need not go into any refinements of language in the section; that is what it means. You may very likely have a case, such as the case suggested by the Solicitor-General in his argument, where carriers who had a number of vehicles with A or B licences, whose work consists in carrying goods from some particular place—the Solicitor-General suggested Covent Garden Market—but which are ordinarily kept at some distance away, it may be because there is not satisfactory garage accommodation available. They may be kept two or three miles from Covent Garden Market, and then it is open to the licensees to go to the authority and say: "Our "vehicles work from Covent Garden Market; that is the centre "which is the true operating centre of the vehicles." It is immaterial, so far as their journeys are concerned, that we have to keep them a mile, or may be a couple of miles—or it might be three or four miles—away. What we want to do is to act as carriers of goods from Covent Garden Market, that is our work, and therefore we ask you to allow us to change the centre of the circle within which we are entitled to operate to the place from which, in fact, we do our work. That seems to me to be the object of s. 58, and in the particular case with which we are now considering no one suggests that the true operating centre of these vehicles is anything but Luton.

It was quite frankly put forward in the course of the case, that the business which the applicants carry on is the conveying of straw hats, of which we know Luton to be the principal manufacturing centre in England, to various establishments and business houses, more particularly no doubt in London. Their work consists in carrying these goods, which are manufactured at Luton, not at London Colney. At London Colney they have no customers at all, except possibly one customer, so when one is considering what is the true operating centre of these vehicles, it is Luton and nowhere else, not London Colney, although that might be a convenient place for the applicants, and indeed for their customers, because it would give them a different radius. No doubt, whenever an operating centre is moved, there is at once a different radius, but it is not the true operating centre. It appears clear, I think, that what the licensing authority has decided in this case is this: you are asking me to alter the operating centre, but now that I have heard and appreciated the facts, it appears clear to me that what you are really asking for is permission to run more than 25 miles from your operating centre, and I am not going to allow an application, which ought to be made under s. 52, to be made under the colour of an application under s. 58. By using the words "under "the colour" it must not be thought for a minute that I am suggesting there was anything improper in this, because this was an interesting point, and a point on which it was perfectly legitimate to get a decision, but it seems to me that it is clear that the licensing authority can say: In regard to you people who operate your lorries from Luton, and operate them for the purposes of conveying goods from Luton, and for Luton manufacturers, it would be wrong to give you an operating centre at a place, from which you do not collect goods, where there are no manufacturers who are the customers for whom you work and for whom you desire to work, and where you may have one customer, but only one, to whom you desire to take goods. The effect of that would be to enable you to run your vehicles for a considerably greater distance from your operating centre than 25 miles. If you want that permission, you must go to the British Transport Commission and apply to be allowed to run greater distances than 25 miles. I think that when these facts are considered, understood and appreciated and when the purposes of ss. 52 and 58 are appreciated, it becomes clear that these are not alternative sections, but they are sections which are intended to deal with different sets of circumstances.

I think that some little difficulty has been caused in this case, by reason of the fact that the licensing authority—that is to say, the gentleman who is the licensing authority—expressed his reasons in a somewhat elliptical form. I think it is a rather elliptical judgment, but when the facts are appreciated, I think it is reasonably clear that what I have said he meant to decide is what in fact he did decide. The material part of his judgment is this: "We feel that these representations and evidence ought more appropriately to be presented "in due course to the Commission on an application for a "permit under s. 52. They seem to us largely irrelevant "to an application to a licensing authority to fix an operating "centre under s. 58. It seems clear to us that the general "purpose of Part III of the Act and the intention of "Parliament in so framing it, is that a person who wanted "to carry goods for hire or reward over the 25 miles radial "distance from his operating centre would have to apply "to the Commission for a permit and not seek to achieve "his object by an application to the licensing authority to "fix a notional operating centre under s. 58. To grant the "application in this case would, in our opinion, have the effect "of defeating the clear intention of the Act and the intention "of Parliament in placing it on the Statute Book As the "licensing authority, I, therefore, decline to accede to "the request of the applicants."

When once the facts of this case are appreciated, I think it is quite clear that what the licensing authority meant was this: there is no ground here for shifting your operating centre as an operating centre; what you are really asking us to do is to allow you to run more than 25 miles from Luton, and for that you must go to the Commission, and not come to the licensing authority for the purpose of altering the operating centre.

For these reasons, in my opinion, the application fails and must be dismissed.

HUMPHREYS J. I do not propose to say much upon the main question which has been argued here, but I think it right to say that I agree with and would emphasize the importance of the rules to which my Lord has referred, in cases of applications for mandamus, being observed.

This is really a very short and simple point. In my opinion, with all due deference to others, a great deal of the argument which was addressed to us has very little to do with the point which we have to decide. It is not for us to say whether the licensing authority was right or wrong. All that we have to consider is this: there was brought before this inferior tribunal a certain application under an Act of Parliament. He heard it, and heard it fully; there is no question about that. He heard counsel on both sides. He consulted with his deputy and gave what amounts to a considered judgment. It is said, upon the application for an order of mandamus, that that judgment amounted to a refusal, a declining of jurisdiction. In order to ascertain whether that is true or not, it appears to me essential that the court should confine its attention to what was said. We were invited to construe what was said by the light of all the arguments which were addressed to that tribunal, and, as my Lord has pointed out, to consider upon that matter an affidavit of the tribunal—that is, the gentleman who is called in the Act of Parliament " The Licensing Authority "—made by himself, in which, in effect, he says : " What I intended " to say was . . . .," or " What I meant was . . . ." I think that is totally irrelevant, and I want only to emphasize what has been said by my Lord, with which I entirely agree, that any such proceeding would lead this court into inextricable confusion when it had to deal in times to come with other applications for an order of mandamus.

The next observation I should like to make is that whether it was argued or not, or intended to be argued or not, I do not think any conclusion on the question of whether there was a declining of jurisdiction can be arrived at by considering the fact that the tribunal did listen to evidence and speeches on both sides. There is no allegation in this case that the tribunal took the view at the outset that it would refuse to consider the application. It did consider it, but that does not prevent an order for mandamus going, if eventually the tribunal, having heard amongst other things argument on that point, came to the conclusion that they ought not to grant the application, for the reason that there was somebody else who ought to have granted it, or somebody else who ought to, or might, have been applied to in some other way. The whole question here is : Did this tribunal, in effect, say : " I decline " jurisdiction to grant this " ?

On the main question which has been argued, I think it is quite plain that the tribunal, the licensing authority, did refuse this application because of s. 52, the application being made under s. 58. He did not refuse it upon any other ground. The best proof of that is, that he did not mention any other ground in his careful, considered judgment. He did not say a word about the public not being properly served, or about there being other competitors who ought to be considered, or anything else. I am not pretending to quote his words ; I am advisedly not quoting his words, but all that he observed in his judgment was that there is another section of this Act of Parliament under which a person could

1949

REX
v.
THE LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA.
Ex parte B. E. BARRETT LD.

Humphreys J.

obtain that which I think they are asking for, and on the whole I refuse to grant the application which they are now making. The question, to my mind, comes back to this: Was he entitled in the exercise of his discretion to take into consideration the existence and the terms of s. 52? Clearly in my opinion, he was. A tribunal, in considering whether it will grant any application, is entitled to, and indeed must, look at other sections of the Act and take them into account, in addition to the particular section under which they are asked to grant the licence. That is elementary. I think that what emerges from the language of this judgment, though the language perhaps was not most happily chosen, is that the tribunal was considering s. 52 as distinct from s. 58, and did not say that he refused the application upon its merits or demerits; he did not think it was necessary to give these additional facilities to these applicants, and he did so, partly because he had considered the facilities afforded by s. 52 and, perhaps even more important, the prohibition contained in s. 52 against anybody, unless they could obtain a permit from the Transport Commission, carrying goods more than 25 miles from their base of operation.

For that reason I think the application fails, and I would add this. I think that, to some extent, there has been—I will not say from beginning to end, but certainly from the beginning to the middle of this matter—a confusion of thought, and it begins in the relief as stated in the grounds of application. It is said that the tribunal "wrongly declined jurisdiction "by holding that, whatever the merits of the applicants' "case might be, the application ought, on the proper "construction of the Transport Act, 1947, to have been "made to the British Transport Commission under s. 52 . . . ." That is plainly wrong. If it means what it says, that this application ought to have been made to the Transport Commission, it is quite obviously wrong, because the British Transport Commission had no power to grant it. They have no power to deal with the question of altering the operating centre, to make a point and say: "this is to be "the operating centre." That is not the Transport Commission's duty at all. What is meant, no doubt, is this; it ought to run in this way, I think: Whatever the merits of the applicants' case might be, he declined jurisdiction by holding that, on the proper construction of the Act, a different application might have been made to the British Transport

Commission, which would have effected the same result. Then, looking at s. 52, I find that there is an absolute prohibition, unless people can get a licence from the Transport Commission, against operating more than 25 miles from their operating centre. I take that into consideration, and I think, although no doubt there are merits in this application, that is an overriding consideration which I ought to take into account myself. I think it was really because he took that view that he declined this application. Whether he was right or wrong, I do not stop to consider, and I do not think this court has anything whatever to do with it. It may be that it would have been better if he had said: "I decline "this application on its merits," and said nothing about s. 52, but I think it is greatly to the credit of the gentleman who forms the tribunal in this case, recognizing, as no doubt he does, that he is a single individual appointed to be the sole judge without any appeal to any human being, court or otherwise, against his decision, that he thought it right that he should state what was in his mind. I think it right that he should do so, and that other persons in a similar position should do so, and I do not think the court ought lightly to say that he has refused jurisdiction because he has based his judgment mainly upon the existence of s. 52, with its prohibition, followed by the possibility of getting rid of that prohibition in a particular case by an application to that tribunal, which application, of course, the licensing authority would have no power to grant.

For those reasons, I agree with the judgment of my Lord.

BIRKETT J. I agree with the two judgments which have just been delivered, and in ordinary circumstances I should have contented myself with that simple statement, but out of deference to the argument of Sir David Maxwell Fyfe and, I must add, to the fluctuations of my own mind as the arguments proceeded, I should like to add a very few words to give my reasons for my agreement with the two judgments which have just been delivered.

In the initial stages of this argument I was attracted by the submissions made by Sir David Maxwell Fyfe. One form of the argument presented was that Parliament had given to the subject two distinct and separate rights which, in his discretion, he should choose to exercise, and that what had happened in this case was that an applicant, proceeding under a particular section, the right having been bestowed upon him by Parliament, had been refused his rights under that particular section. I must say that at the same time I was troubled by the reflection that, although the central ground of the submission was that jurisdiction had been declined, yet all the time there were present all the outward and visible signs of jurisdiction having been exercised. All the witnesses were heard, the evidence was put forward quite freely, there was the most helpful discussion of the whole scheme of the Act, and in particular I have had the advantage of reading the very lucid exposition of this very complicated matter in the speech of Mr. Stockdale. All those matters were before the licensing authority. I was troubled at all times by the reflection that, in a case where the main point was that jurisdiction had been declined, it would appear that certainly the outward forms of entertaining jurisdiction had always been observed.

I think it is important to remember the exact point which is at present before this court. It is a motion " for an order " of mandamus that the licensing authority for goods vehicles " for the metropolitan traffic area re-hears and determines " an application by the applicants under s. 58, sub-s. 4, of the " Transport Act, 1947, requesting him to specify a point " to be treated as the operating centre of certain vehicles, " in respect of which they hold a public carrier's A licence " upon the grounds set forth in the copy statement," and among those grounds, the first and the chief is that he, that is the licensing authority, wrongly declined jurisdiction. Upon that matter I should like to make reference to a few words from the judgment of Bankes L.J. in the case of *Rex* v. *Port of London Authority, Ex parte Kynoch, Ld.* (1), wherein he said : " Every case must depend on its own particular circumstances ; but decided cases furnish some rules " which ought to govern the court in the exercise of its " discretion to grant or refuse the prerogative writ of mandamus. " There must be something in the nature of a refusal to " exercise jurisdiction by the tribunal or authority to whom " the writ is to be directed. A refusal may be conveyed in " one of two ways : there may be an absolute refusal in terms, " or there may be conduct amounting to a refusal." If I may stop there, Sir David Maxwell Fyfe rather suggested it was the second head upon which he relied, and he relied in particular upon what my Lord has called the elliptical language of the decision. Bankes L.J. proceeded: "In "the latter case"—that is, the conduct amounting to a refusal—"it is often difficult to draw the line between "those cases where the tribunal or authority has heard "and determined erroneously upon grounds which it was "entitled to take into consideration and those cases where "it has heard and determined upon grounds outside and "beyond its jurisdiction; but this conclusion may be "drawn from decided cases, that there is no refusal to hear "and determine unless the tribunal or authority has in "substance shut its ears to the application which was made "to it, and has determined upon an application which was "not made to it." He then quotes Farwell L.J. in the case of *Rex* v. *Board of Education:* "If the tribunal has "exercised the discretion entrusted to it bona fide, not "influenced by extraneous or irrelevant considerations, and "not arbitrarily or illegally, the courts cannot interfere; "they are not a Court of Appeal from the tribunal, but they "have power to prevent the intentional usurpation or "mistaken assumption of a jurisdiction beyond that given "to the tribunal by law, and also the refusal of their true "jurisdiction by the adoption of extraneous considerations "in arriving at their conclusion or deciding a point other "than that brought before them, in which cases the courts "have regarded them as declining jurisdiction."

---

(1) [1919] 1 K. B. 183.

In this case the application was made under s. 58, sub-s. 4, of the Transport Act, 1947. The whole point of the application that was made to the licensing authority was for the fixing of a notional point at London Colney, which should be their new operating centre, and my Lord has dealt with the facts so fully that I certainly do not intend to pursue them any further. It was conceded before the licensing authority, and indeed it was most strongly emphasized both by Sir David Maxwell Fyfe and certainly by Mr. Stockdale, that the licensing authority had the fullest discretion in dealing with the application under s. 58. It seems to me, on full reflection, that it was vital for the proper exercise of that discretion that the licensing authority should consider the part which s. 58 played in the whole scheme of transport comprehended in the sections in Part III of that rather complicated Act. It would have been quite impossible, in my judgment, to exercise a proper and equitable discretion without full consideration of the background of legislation of which s. 58 forms part. The

1949

REX v. THE LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA. *Ex parte* B. E. BARRETT LD.

Birkett J.

opposing contentions were these. It was said: no doubt the evidence was fully placed before the licensing authority, there was no let or hindrance there. He listened to all the evidence which we desired to tender. There was no doubt that the fullest opportunity was given to all interested parties before the licensing authority to express their views with complete fullness. No complaint can be made on that head, but when the language of the decision of the licensing authority is looked at, then it is said the whole of that is vitiated, because the construction to be put upon the language was that he had virtually declined to exercise jurisdiction in this matter. The language of the decision has been called "elliptical" by my Lord. At the Bar it was called "plain English," but it would not be the first time that words expressed in plain English have been the subject of very much disputation. However, the language which is employed here does lend colour, certainly at first sight—for my own part that is why I was attracted to the argument of Sir David Maxwell Fyfe—to the view that could be taken: "I have listened to all this "matter, but, when I come to make my decision, I say that "everything I have heard has been irrelevant." Certainly, in the supplementary judgment, where the licensing authority in a subsequent case referred back to this case, the use of the words "In the exercise of our discretion it would not be proper "for us to fix a notional operating centre merely to relieve "an operator of the obligation imposed by the Act to obtain "a permit from the British Transport Commission," might lead to the interpretation, as I think, that what the licensing authority was seeking to say was this: "We really cannot "entertain an application under s. 58, because there is an "obligation for you to go under s. 52." That was one of the contentions that was made, and I hope that I have not in any way distorted that contention by endeavouring to express it. As against that, it was said, and this I think to be the true view, that the licensing authority heard all the evidence presented, listened to the full argument presented, took into consideration the scheme of the Act, and particularly Part III and the particular provisions of ss. 58 and 52, and then said: "In the exercise of our discretion, having heard and listened "to all the relevant matters, we refuse this application; "we think that the real purpose of this application was the "purpose which is more appropriately and more properly "comprehended under s. 52 of the Act." I think the licensing authority in so doing, exercised a proper discretion, and certainly in those circumstances, in my opinion, it could not be said, which is the central and fundamental thing which Sir David Maxwell Fyfe must establish in order to succeed, that the licensing authority had declined jurisdiction.

For these reasons, I agree with the two judgments which have just been delivered and with the results which follow therefrom.

Application dismissed.

Solicitors for the applicants: *Mawby, Barrie and Letts.*
Solicitor for the Crown: *Treasury Solicitor.*
Solicitors for the Railway Executive: *H. B. Gilmour; R. P. Humphrys; E. Coleby; H. F. Burt.*
Solicitor for the Road Transport Executive: *J. C. Chambers.*

L. F. J. McD.

PHILLIPS *v.* LAMDIN.

1949
Mar. 7.

Croom-Johnson J.

Vendor and purchaser—Contract for sale of land—Vendor's breach of duty of care—Vendor's delay in completion—Damages awarded after completion.

The plaintiff, a naturopath, entered into a contract with the defendant for the purchase of leasehold premises which she required for professional and residential use. Completion date was fixed as March 28, 1947. In the event of failure to complete on the agreed date, the contract provided for the payment of interest by the purchaser on the outstanding purchase-money from the date fixed for completion to the date of actual completion. The contract also laid down a time limit of four days, which the plaintiff in fact exceeded, for the return by the purchaser to the vendor of the engrossed assignment after a draft thereof had been agreed by the vendor.

The plaintiff had issued a writ for specific performance on April 15, 1947, but the matter never came to trial as possession was granted on June 5, 1947. She now claimed damages including damages for loss of earnings and expenses caused by the vendor's failure to give her possession on March 28. She also claimed the reinstatement of an Adam door removed by the vendor at some time between the date of the contract and completion.

Held. The vendor's delay in completion of the contract was wilful and wrongful, and the plaintiff was entitled to recover

[Reported by Mrs. L. N. BUCHER, Barrister-at-Law.]

1949

PHILLIPS
v.
LAMDIN.

the damages claimed calculated from the date when her own default ceased.

Held further that the defendant should be ordered to reinstate the door, without having an option to pay its value.

ACTION tried by Croom-Johnson J.

By a written contract dated February 20, 1947, the defendant agreed to sell to the plaintiff certain leasehold premises at 19, Park Road, St. Marylebone. The plaintiff, a lady practising as a naturopath, required the premises for professional and residential use. By the special conditions of the contract the date fixed for completion was March 28, 1947, but the sale was not in fact completed until June 5, 1947.

The contract was expressed to be subject to the National Conditions of Sale, No. 1, thirteenth edition, the relevant provisions of which are the following:

"3. (4.) If from any cause whatever (except as hereinafter "provided) the purchase shall not be completed on the day "fixed for completion, the purchaser shall pay interest on "the remainder of his purchase-money at the rate provided "by the special conditions, or if no such rate is provided, "then at the rate of 5 per cent. per annum (less income tax "at the current rate) from that day until the purchase shall "actually be completed, but the vendor shall have the option "(upon giving notice in writing before actual completion) "of taking the rents and profits of the property (less outgoings) "up to the date of actual completion instead of the said "interest.

"(5.) Provided that if the delay in completion arises from "the state of the title or from any cause (other than the "neglect or default of the purchaser), and if the purchaser "places the remainder of his purchase money at interest on "a deposit account with any bank within 20 miles of the office "of the vendor's solicitor or on any security which the "purchaser may think fit (the same being made at his own "risk), and gives written notice thereof to the vendor or his "solicitor, then in lieu of the interest or rents and profits "payable to or receivable by the vendor as aforesaid, the "vendor shall from the time of such notice be entitled to such "interest only as shall be actually produced by such deposit "or security.

"13. (1.) Upon payment by the purchaser of the remainder "of his purchase money . . . . the vendor . . . . shall execute "a proper conveyance of the property to the purchaser . . . .

1949

PHILLIPS
v.
LAMDIN.

"(2.) The draft of such conveyance shall be delivered "at the office of the vendor's solicitor at least ten days before "the date fixed for completion for perusal on behalf of the "vendor . . . . and the engrossment of such conveyance "for execution by the vendor . . . . shall be left at the said "office within four days after the draft has been returned "to the purchaser approved on behalf of the vendor . . . ."

The plaintiff's solicitors forwarded a draft conveyance to the defendant's solicitors on March 25, 1947, and mentioned their client's wish to have possession on the agreed date. They made further representations the next day. On March 28, 1947, the defendant's solicitors replied that they could not give possession for six weeks owing to unforeseen delays over the house their client had hoped to move into. On the same date the plaintiff's solicitors wrote to the defendant's solicitors demanding immediate possession and saying their client would institute an action for specific performance if completion were not arranged by April 2, 1947. On April 9, 1947, the plaintiff's solicitors forwarded to the defendant's solicitors the engrossment of the conveyance. (Extracts from these letters are quoted in the judgment.)

On April 15, 1947, at the instance of the plaintiff, a writ for specific performance was issued, but the matter was never brought to trial, as the defendant executed the conveyance and gave possession of the premises to the plaintiff on June 5, 1947, and paid her costs of that writ.

At some time before completion the vendor caused an ornamental door and its frames to be removed from a first-floor room in the premises and substituted a plain door and frames.

T. G. Roche for the plaintiff. At the time the written contract of sale was made the defendant was aware that the plaintiff intended to use the premises both for residence and for her professional practice as a naturopath immediately on completion, and was making arrangements to that end. The letters of March 25 and 28, 1947, from the plaintiff's solicitors to the defendant's solicitors gave further notice of that intention and of the importance of completion on the agreed date. The vendor's delay in completion was wilful and wrongful. Damages for such delay are recoverable from the vendor in addition to performance of the contract: *Royal Bristol Permanent Building Society* v. *Bomash* (1).

---

(1) (1887) 35 Ch. D. 390.

1949

PHILLIPS
v.
LAMDIN.

Although the plaintiff's solicitors did not deliver the engrossed assignment for execution within the time prescribed by the contract, the submission of the engrossed assignment is not a condition precedent to the vendor's duty to complete. Alternatively, the defendant by his letter of March 25, 1947, and that of March 28, stating that completion could not take place for six weeks, induced the plaintiff's failure to submit the engrossment and the defendant is therefore precluded from relying on that circumstance.

The removal of the door from a first floor room was a breach of the vendor's duty not to do anything to injure the property after the contract for sale was signed: *Clarke* v. *Ramuz* (1).

H. G. Garland for the defendant. A contract is discharged by performance of the obligations thereby undertaken: Williams on Vendor and Purchaser, 4th ed., vol. 2, p. 981. This contract was so discharged by the conveyance giving possession on June 5, 1947. The plaintiff has obtained the remedy she sought and cannot now ask for damages. Damages are not recoverable for mere delay in completion of a sale of land. *Jaques* v. *Millar* (2), and *Jones* v. *Gardiner* (3) are distinguishable as in the present case performance was voluntary. There can be no damages after conveyance complete except in the case of enforcement of a collateral agreement.

It is agreed that time was not of the essence of this contract. If the plaintiff wished to make time of the essence she should have given notice thereof to the defendant, who would then have been liable for delay: *Webb* v. *Hughes* (4).

The plaintiff herself was in breach of the contract owing to the delay in delivering the engrossment of assignment to the vendor.

CROOM-JOHNSON J. This is an action brought by a Miss Phillips to recover damages against a Mr. Lamdin arising out of a contract between the parties for the sale and purchase of leasehold interests in a messuage and premises No. 19, Park Road, Marylebone. The plaintiff says that there was unreasonable delay in completing the contract, that is, completing the sale and purchase, and she says that as a result of that she has sustained considerable losses and inconvenience. She says, in addition, that while the property

(1) [1891] 2 Q. B. 456.
(2) (1877) 6 Ch. D. 153.
(3) [1902] 1 Ch. 191.
(4) (1870) L. R. 10 Eq. 281.

was still in the control of the defendant, that is to say, while it was in his possession, that he failed to exercise the care that a vendor in possession of land should exercise between the date of the contract and the date of completion, and she says that so far from exercising that control, the defendant exercised too much, and that what he did was to remove some of the property which had been sold and take it away.

The case is unusual in some aspects. The plaintiff practises as a naturopath, and she was practising at an address elsewhere in London, having a practice which was increasing. Somewhere early in 1947 she was minded to move to rather more elaborate premises, partly with the idea of taking residential patients, and she viewed the house, No. 19, Park Road, on two occasions with the object of purchase. Ultimately, on February 20, 1947, she and the defendant signed contracts in writing for the sale of the house for the sum of 3,150*l.*, and the plaintiff paid a deposit of 315*l.* The day fixed for the completion of the purchase was March 28, 1947. The purchase was not in fact completed until June 5, 1947, and it is in respect of that lapse of time, that delay between March 28 and June 5 that the plaintiff claims her damages.

His Lordship here referred to the National Conditions of Sale quoted above, and continued: I am quite satisfied that the plaintiff informed the defendant through his wife as his agent concerned with the negotiations of the importance of her having possession on the due date. Indeed, I do not think that that is denied. In due course the abstract was delivered and the assignment was prepared after the requisitions had been answered.

The draft assignment was forwarded on March 25, the date of completion being fixed as March 28, and in a letter of the 25th, enclosing the draft assignment, there is this statement: "Our client is most anxious to complete if possible on the date "fixed, and has made all her arrangements accordingly. "She will be put to considerable trouble and inconvenience "if she is forced to cancel arrangements she has already made "for moving in on the 29th instant. We would particularly "stress that the completion date was fixed after considerable "discussion and your client has been fully aware throughout "that these premises were and still are required for our client's "personal occupation." On the same date the defendant intimated to the plaintiff that he would not be able to arrange for possession on the 28th in accordance with the contract.

The precise reason for that does not at first appear. The draft assignment was approved, and the solicitors acknowledged receipt of the approved draft in a letter of March 26, 1947: "We are engrossing the assignment and will forward the "same for your client's execution shortly and we should "be glad to hear from you without delay as to the date when "your client will be in a position to complete this matter. "As you will appreciate, our client has to make adequate "arrangements accordingly," to which the answer came on the very day fixed for completion from the defendant's solicitors to the plaintiff's solicitors: "We are in receipt "of your letter of the 26th inst. and with regard to the "completion, we have today heard from our client that he has "already informed your client that it will be impossible to "give possession of this house for another six weeks as there "have been completely unforeseen delays on the house he "had hoped to move into due to the Authorities." I know no more about the defendant's position than what is stated in that letter. The defendant has not given evidence before me, and nobody has given evidence on his behalf on that point. They go on to say: "Under these circumstances it will not "be possible for us to complete on the 28th instant." The solicitors acting for the plaintiff dealt with that position at once in a letter of the same day, March 28, 1947, warning the defendant that it was "a matter of the greatest urgency "that our client should be given immediate possession of "the house." They warned the defendant that a staff was being engaged for the house and that the plaintiff had given up possession of the existing premises in which she was carrying on her practice. The solicitors for the plaintiff then said that the plaintiff still held the defendant "responsible "for the loss which she must inevitably sustain as a result "of any delay in completion and, frankly, delay of as long "as a month will practically ruin her. Our client for her part "is ready, able and willing to complete the purchase today "and will do so at any time on short notice. . . . If, however, "completion is not arranged by Wednesday of next week, "April 2, our client will have no alternative but to commence "an action immediately for specific performance." That is an express notice to the defendant through his solicitors that beyond April 2 she would not go. While this correspondence was taking place, the engrossment of the assignment had not been forwarded to the defendant's solicitors. What good it would have done to have sent it during that time, perhaps it is hardly worth while considering, but the engrossment of the assignment was sent on April 9, which is seven days after the suggested new date of April 2. Much point is made of that circumstance on behalf of the defendant, it being suggested that the plaintiff through her solicitors was herself in breach of the terms of the contract ; and so she was. But by April 9, there was no difficulty at all about it. On April 11, the engrossment, according to a letter of that day, was forwarded by the defendant's solicitors to the defendant, who was away in the country. They say : " We are forwarding " the same to our client, who is away in the country, but who " is and always has been willing to complete." How that statement came into that letter it is a little difficult for me to understand. It just is not accurate. So far from the defendant being ready or always being willing to complete, he was saying, as this correspondence shows, that he could not complete, that there was some circumstance, unexplained, undefined, and not before me, which made it impossible for him to move into the house which he had purchased and to which he was going to remove after leaving No. 19, Park Road. But the solicitors dealt with that, and apparently about that time it was indicated to the plaintiff's solicitors that the defendant would not be able to complete for another six weeks : that it would be impossible to complete. Six weeks from April 14, would take him down to the end of May. I am as puzzled about that statement as I am by some of the other statements made on behalf of this defendant, because on May 9, the house where the defendant was living was empty. So this explanation that the defendant could not move out of these premises because of some difficulty with the Local Authority is at all events by May 9 palpably incorrect. No reply was made to the letter of May 9 telling the defendant's solicitors that the premises were empty. I have no doubt at all that they were, and what the defendant was doing from that day until June 5, when the purchase was in fact completed, I do not know, but I have no doubt, viewing this correspondence, that the fact that there was a writ for specific performance brought either the solicitors for the defendant or the defendant to their senses.

In those circumstances, in the absence of any indication at all of there being some question of deficiency in title or any one of the ordinary causes for delay which excuse people from not carrying out on the day fixed for completion the completion of a sale of property of this sort, I am forced to the conclusion that there was something behind all this. I cannot see any explanation at all for these delays after April 9. I think it is conceivably possible that up to April 9 there may have been some difficulty in the way of the defendant getting out of the premises, and, had this been an action for specific performance, which is an equitable remedy, it may very well have been that if it had come for trial before April 9 there might have been good reason in equity for the defendant being excused from a decree being made up to that time. I can see none afterwards. The title had been accepted, the draft assignment had been approved, the engrossed assignment had been sent, and I view this correspondence with surprise mingled with distrust. Of course, the solicitors were not responsible; no one would dream for a moment of thinking they were. In the absence of the defendant here, I have come to the conclusion that this is a case of wilful default, at all events from April 9.

These are shortly the facts of this particular branch of the case; but I think, in estimating what I think about the defendant, I cannot altogether exclude from my mind the other part of the case, and that is this. When the plaintiff went to view the premises there was in one of the rooms, a mantel-piece of a somewhat ornate design, which I gather has been attributed to one of the brothers Adam. In the same room, and matching that mantel-piece, there was a door similarly designed and ornamented. The plaintiff saw it there twice before the contract was made. When she went to the premises after this long delay in completion, the door was not there, and instead of the, to her, handsome and ornate door, there was a door in some sort of white wood, looking anything but attractive and which had never even been painted on the inside. The answer made by the defendant to that is: "When "we were showing you over the premises you were told that "that door was going to be removed to our new house, and "that the original door in the house would be put back again "in substitution," and that is, in brief, the defence which is pleaded. One of the difficulties of that, of course, is that there is not a word of that in the written contract, and Mr. Garland has not attempted to argue that if those facts had been proved it would have justified what the defendant did. But the extraordinary thing about it is that although the plaintiff was asked one or two questions about it to lead to that sort of case, nobody gave evidence about the door on behalf of the defendant, and I have come to the conclusion that the defendant had no sort of notion of what his duties were with regard to the property which he had sold. I cannot help thinking that similarly he had no notion as to his duty under the contract, which was to complete on March 28. It strengthens the view which I have formed that this was wilful delay and default by the defendant, and I propose to deal with this case on that basis. All I have heard about the door is from learned counsel for the defendant. He tells me this, of course acting upon his instructions, that the door in question has been removed to the house in Hanover Terrace where the defendant is now living.

Now upon all this state of affairs I think the law is really quite simple. According to *Clarke* v. *Ramuz* (1), where a vendor remains in possession pending completion he owes a duty to take reasonable care to preserve the property. It is sometimes said that he is a trustee of the property but, if he is, it is not the same sort of case as the case of other trustees. But there are certain duties imposed upon him by the law, " one of which is to use reasonable care to preserve " the property in a reasonable state of preservation, and, so " far as may be, as it was when the contract was made," see per Lord Coleridge. So that even if somebody else had removed this door without a care by the defendant to stop him, the defendant might have been responsible. But this is a case in which the defendant, in the teeth of his contract, has removed something which is not a mere trifle. I entertain no doubt at all that the defendant is liable to replace the door and to bring it back. You cannot make a new Adam door. You cannot in these times re-fashion a door or make a copy. It seems to me that this is a proper case in which the defendant should be ordered to return the door to where it belongs and to pay the expense of taking it down from where it is, bringing it back to where it ought to be, No. 19, Park Road, and re-fixing it, and paying any expenses that there are about it. I do not see how damages can be an adequate remedy in that case, and I do not mean, if I can avoid it, to give this defendant the opportunity of saying: " Well, I will not return it and, " that being so, the court must assess the value and I will " pay that." We must remember that the mantel-piece is there, left behind. I will make an order in an appropriate

---

(1) [1891] 2 Q. B. 456, 459.

1949

PHILLIPS
v.
LAMDIN.

Croom-Johnson J.

form which will let this lady have what she was entitled to have when the contract was completed, and I must fix a time limit for the defendant to do what he ought to do.

Now with regard to the rest of the case, it is said: "This "is mere delay. You cannot recover damages for mere delay "for non-completion of a contract for the sale of land." Mr. Garland, in one of his usual interesting arguments dealing with out of the way topics of law, has indicated that really and truly if time is not of the essence of the contract here, and everybody agrees it is not, you might make time of the essence by giving an appropriate notice during the progress of the negotiations towards completion, and that when time had been made of the essence it would then be possible for the plaintiff to rescind the contract. He cites as an example of the application of that state of the law *Webb* v. *Hughes* (1). Of course, that is one thing that the purchaser can do if the purchaser is so minded, but this purchaser does not want to rescind. No doubt in an ordinary contract for the sale of goods, if there is no time limit fixed or no time limit which is of the essence of the contract, it is possible to give express notice to the other party, saying: "Unless "you complete within a certain time I shall rescind the contract, have my money back, and claim damages"; but that is not the end of the matter. I have never heard it suggested that in an ordinary contract for the sale of goods, when a reasonable time has elapsed and the goods have not been delivered, that the only thing that can be done is to give notice and then seek to rescind and then seek to recover damages. Damages for breach of contract for delay, even after the purchase and the sale of goods has been completed, are always recoverable in a proper case, provided that the plaintiff can prove them. There is no distinction to be drawn in general, so far as I am able to ascertain from passages in Dart on Vendor and Purchaser, 8th ed., vol. 2, and Williams on Vendor and Purchaser, 4th ed., vol. 2, between contracts for sale of land and any other contracts except in this respect, that where the contract is not completed owing to some conveyancing difficulty, or some difficulty with regard to title and the matter goes off courts of equity will not give damages for loss of the bargain, the reason apparently being that the uncertainty of title in this country is thought to make an exception to that general rule. The rule is known as

---

(1) L. R. 10 Eq. 281, at 286.

1949

PHILLIPS
v.
LAMDIN.

Croom-Johnson J.

the rule in *Bain* v. *Fothergill* (1), and I am not meeting it today for the first time. That being so, I cannot see that this point of Mr. Garland's can really be given effect to. But I am not left to my own unaided intelligence. In the case of *Jones* v. *Gardiner* (2), Byrne J., very nearly fifty years ago, had to grapple with this kind of problem. He also grappled with another argument of Mr. Garland's, that where the contract provides for payment of interest when there is delay in completion, that that circumstance furnishes an answer in any claim for damages for delay. Byrne J. decided that where the delay has been occasioned by default of the vendor, "not in consequence of want of, or defect in, title, or in "consequence of conveyancing difficulties," but by reason of the vendor not having used reasonable diligence to perform his contract, that damages could be recovered. "There is "no question in the present case" (3) said the learned judge, "of want of good faith, as evinced by any desire to repudiate "the contract, or of fraud; but, having carefully considered "all the proceedings and the correspondence and the evidence, "I am of opinion that a very considerable part of the delay "which has occurred in carrying out the contract (after "making full allowance for the time which may fairly be "considered to have been due to difficulties in making out "title, and to a controversy as to the form of the conveyance) "has arisen entirely from the default of the vendor—default, "that is, in doing what he could reasonably and fairly have "done had he been duly careful to fulfil his contract. So "far as the materials before me enable me to judge, the contract "might certainly have been carried out, making a liberal "allowance for delay in consequence of the difficulties and "discussions I have referred to, three months earlier than the "actual date of completion." Except for the point that the engrossment of the assignment was not forwarded by some oversight by the solicitors after they had been told that completion would not be made on the proper date, no part of this delay can be attributed by any reasonable person to the actions of the plaintiff's solicitors. The learned judge then goes on to deal with *Bain* v. *Fothergill* (1), and he says that in *Engell* v. *Fitch* (4) "which was considered in *Bain* v. "*Fothergill* (1), so far as it determines that where the breach "of contract arises, not from inability to make a good title,

---

(1) L. R. 7 H. L. 158.
(2) [1902] 1 Ch. 191.
(3) Ibid. 195.
(4) L. R. 4 Q. B. 659.

"but from refusal to take necessary steps to give the purchaser "possession pursuant to the contract, further damages may "be recovered, appears to remain good law. *Jaques* v. "*Miller* (1) is a distinct authority for giving damages against "a vendor, in addition to specific performance, in respect "of delay caused by wilful refusal to carry out a contract, "and for the measure to be applied in ascertaining the damages, "namely, such damages as may reasonably be said to have "naturally arisen from the delay, or which may reasonably "be supposed to have been in the contemplation of the parties "as likely to arise from the partial breach of contract. This "case," says the learned judge, "was followed in *Royal Bristol* "*Permanent Building Society* v. *Bomash* (2)"—which was cited to me by Mr. Roche. The learned judge in that case acquitted the defendant of any ulterior motive. I do not find it necessary in this judgment to go into that in this case. But on those lines it seems to me that this plaintiff has made out her case for damages, and the only question in my mind is whether I can give her damages from March 28 down to June 5, or whether I should give her damages only from April 9. I think that, on the whole, it is safer to say that as there was a breach by the plaintiff's solicitors in not sending the engrossment of the assignment at once, although I do not think it made any difference to anybody, that the damages should start from April 9.

This lady, having made all her arrangements to occupy this house, had to take her furniture away from the place where it was being housed and had to house it in another room in the same premises pending the time that she could remove it to 19, Park Road. She had arranged with removers to remove her furniture from one house to the other, and she paid 4*l.* for cancelling the date which they had reserved for her and making a new date. Then, through no fault of anybody's that I can see, certainly not of the plaintiff's, she had to make an interim deposit of her furniture and of herself, and she went to an address in Belsize Park Gardens, which I think, in the circumstances, in view of this very unsatisfactory correspondence, was a reasonable thing for the plaintiff to do. She asked me to give her some money for her own efforts in writing letters to patients with whom she had arranged at the new place. I am not satisfied myself that, as a matter of law, I can compensate her for her own trouble, although,

(1) 6 Ch. D. 153. (2) 35 Ch. D. 390.

if she had achieved the same result by employing somebody to do it, probably she could have been compensated. Now what I propose to do with regard to those matters is that I must cut down the storage of furniture by the ten days. It is 1*l.* a week. I propose, therefore, to allow her 9*l.* for that. I allow her 4*l.* for the removers and also 5*l.* for the interim move, but not the 5*l.* for extra correspondence. She put in advertisements in a magazine which has to do with these matters, which, of course, were wasted; that is 1*l.* 17*s.* 6*d.* Then the result of it was most disastrous for this lady's practice. I do not propose to make a precise estimate of her loss of earnings. On that head, I propose to give her the sum of 125*l.* Then follow the salaries of the staff specially engaged for the new premises. She has not been challenged about that at all. There was a housekeeper and cook, who, of course, she had to pay while she was waiting, otherwise she would have lost all chance of them, and again I think I must disallow the ten days from that figure, and I propose to give her the sum of 50*l.* under that head, again without making any very precise estimate about it.

With regard to the door and frames. They must be delivered to 19, Park Road, within three weeks from today, and the defendant must make arrangements to have them re-fixed. When I know in what condition those articles have been returned and put up, and see whether there is any damage, I shall be in a position either to assess damages, in case the parties cannot agree, or else I will direct an inquiry as to what damage by reason of this wilful and wanton interference with what was the plaintiff's property has been sustained by reason of the defendant's wrong.

Judgment for plaintiff accordingly.

Solicitors for the plaintiff: *D. B. Levinson & Shane.*
Solicitors for the defendant: *Philip Conway, Thomas & Co.*

C. A.

1949
Jan. 20.

Bucknill and Denning L.JJ. and Vaisey J.

ERITH CORPORATION *v.* HOLDER.

Emergency legislation—Dwelling-house requisitioned in 1941*—For homeless from enemy bombing—Occupied by such persons, as licensees—House purchased in* 1947*—Licensees subsequently leave house—New owner enters house when still requisitioned—Trespasser in his own house—Defence (General) Regulations,* 1939, *reg.* 51*—Ministry of Health Circular No.* 141 *of* 1946.

Ministry of Health Circular No. 141 of 1946 addressed to all local authorities and dealing with the requisitioning of houses, provides that where an owner notifies his intention to occupy the house by himself or his family, the clerk to the local authority is authorized to retain possession of the premises, if the local authority are satisfied that to release the house for occupation by the owner or his family would result in serious under-occupation of the house, subject to the owner if he so desires, being allowed to occupy such proportion of the premises by himself or his family as the local authority deem reasonable for his needs.

Circular No. 141 of 1946 is an extension and amendment of Ministry of Health Circular, No. 138 of 1945, and so applies only to unoccupied premises in the initial stages of a requisition, " after " the requisitioning of the house, but before it is actually brought " into occupation." It has no application to premises which have been validly requisitioned and then occupied by persons rendered homeless by enemy action, as licensees.

APPEAL from the Dartford county court.

On February 19, 1941, the town clerk of Erith requisitioned No. 68, Amberley Road, Abbey Wood, London, S.E.2, for the purpose of occupation by those rendered homeless by enemy bombing, giving due notice to Mr. Ashdown, the then owner. On February 27, 1941, the Minister of Health confirmed the requisition. A family which had been rendered homeless by enemy attack were permitted by the local authority to occupy the home as licensees and remained there until December 16, 1947. A few weeks before the family left, the owner sold the house to the defendant.

The defendant, who had served some six years in the Army, was married and had one daughter. On August 11, 1947, he had written to the town clerk intimating that he was purchasing the house and wished to apply for the property to be derequisitioned when it was vacated by the present licensee. On August 20, 1947, he wrote to the Ministry of Health with the same request, but neither the corporation nor the Ministry were able to give him a date when the house would be derequisitioned. On December 8, the defendant wrote to the borough council saying that he was now the owner of the house and again asking that the house should be released from requisition, but the housing manager for the borough replied that he was unable to give to the defendant any information as to when the property might be released from requisition.

On December 16, 1947, the licensee moved out of the house and the defendant then moved in with his furniture and occupied it with his family. The Erith Corporation claimed in the Dartford County Court the recovery of No. 68, Amberley Road from the defendant who, they alleged, was wrongfully in possession thereof. The county court judge found that the house was requisitioned on December 16, when the defendant entered it, that he was a trespasser there and that the corporation were entitled to possession of the house. The defendant appealed.

Cleworth K.C. and *J. Sofer* for the owner, the defendant. In the county court the point was taken that the extension of the requisition was illegal. The county court judge was adverse to that contention and it is not put forward here. His Honour found that the defendant was a trespasser in his own house. That was not so, since entry and occupation of the house were justified by the terms of Ministry of Health Circular No. 141, dated June 28, 1946, issued to all local authorities in England (1). By the terms of that circular, the local authority were only authorized to retain possession of the house on condition that they were satisfied that to release the house for occupation by the owner or his family would result in serious under-occupation of the house. There was no evidence that the local authority were so satisfied. The words of the circular are: "Where an owner notifies his "intention to occupy the house by himself or his family," —that condition had been fulfilled by the letters of the defendant to the town clerk and the Ministry—"the clerk "to the local authority is authorized to retain possession "of the premises, if" and only if, "the local authority are "satisfied that to release the house for occupation by the "owner or his family would result in serious under-occupation "of the house." Then, even where the local authority is so satisfied the local authority may allow the owner to occupy such portion of the house as they deem reasonable.

---

(1) By a Circular, No. 141, dated June 28, 1946, issued by the Minister of Health to all local authorities in England: "I am "directed by the Minister of "Health to refer to Circular 5/46 "and to say that he has decided "to extend and hereby extends "the operation of Circular 138/45 "as amended by Circular 5/46 "until December 31, 1946, subject "to the following modification. "In the present shortage of "housing accommodation it is "necessary to ensure as far as "possible that all houses are "reasonably fully occupied, and "this is the main intention of "the requisitioning powers which "the Minister has delegated to the "clerks of local authorities. "Accordingly where an owner "notifies his intention to occupy "the house by himself or his "family, the clerk to the local "authority is authorized to "retain possession of the premises "if the local authority are satisfied "that to release the house for "occupation by the owner or his "family would result in serious "under occupation of the house, "subject to the owner, if he so "desires, being allowed to occupy "such proportion of the premises "by himself or his family as "the local authority deem reasonable for his needs and on such "terms as to payment and otherwise as the local authority may "approve."

[Bucknill L.J. Does that mean that if a man buys a requisitioned house and notifies the local authority of his intention to occupy the house, the local authority cannot retain possession of the house, but must evict the family licensed to be there and give the owner possession ?]

Yes, Circular No. 141 of 1946 is quite independent of the other circulars by this provision and the circular should be interpreted for the benefit of the subject—the owner of the house whose rights have been abrogated by emergency legislation.

The circular No. 141 of 1946 was included in the list of circulars put forward by the corporation as relevant to the issue in the action, yet now they are contending that it is irrelevant: they are estopped from putting forward that proposition.

Erskine Simes K.C. and *Squibb* for the corporation. Circular No. 141 has no relevance to the issue in this action, since it extends and is merely a modification of Ministry of Health Circular No. 138 of 1945, which applies only to unoccupied houses. This house was validly requisitioned in February, 1941, and has remained requisitioned ever since. The defendant, though the owner of the house, had no rights to the possession of the house, nor to enter it as a licensee. He was, therefore, a trespasser.

[Denning L.J. This dwelling-house was requisitioned for the purpose of housing those rendered homeless by enemy action. When the licensee left on December 16, did not the requisition expire since its purpose had ceased? See the terms of circular No. 138 of 1945.]

Yes, in the first instance, if the purpose had ceased. But Erith was very heavily bombed, and there was no reason to think it had ceased. Secondly, by the terms of circular No. 5 of 1946 the Minister had provided that all houses still requisitioned by local authorities might be used for the purpose of securing accommodation for the inadequately housed.

Cleworth K.C. replied.

BUCKNILL L.J. On December 16, 1947, the licensee moved out of the house and the defendant moved in with his furniture. It is on that last action of his that the case now turns, whether he was justified in taking that course or whether the plaintiffs are entitled to possession of the house. Here, today, the only point taken by counsel for the defendant is one based on Circular No. 141, dated June 28, 1946, issued by the Ministry of Health to all local authorities in England. [His Lordship read the circular.]

The argument put forward for the defendant is that this circular applies to this present case. The local authority was only authorized under it to retain possession on certain conditions, namely, that the local authority were satisfied that to release the house for occupation by the owner or his family would result in serious under-occupation of the house. It was argued there was no evidence that the local authority ever was so satisfied and, therefore, they were not authorized to retain possession. That argument would be one of weight if this circular applied to the present case, but, in my opinion, when one studies the circular, and still more when one studies Circular 138 of 1945 and Circular 5 of 1946, what the Ministry is dealing with is unoccupied houses which they had just requisitioned or were contemplating requisitioning, and it had no application at all to houses which had been already validly requisitioned and which had been occupied by licensees and which were under requisition at the time. In fact, Circular 138 of 1945 refers at the very outset to the requisitioning of unoccupied houses. If one considers the object of Circular 141, of 1946, it seems to me abundantly clear that, if it were intended to apply to such a case as the present, it would mean that any requisitioned house could be derequisitioned by the simple process of some stranger coming in and buying the house and telling the licensee to go out. I asked Mr. Cleworth

BIBL. LONDIN UNIV.

when it was he said the house became derequisitioned. As I understood his answer, it was that it became derequisitioned as soon as the defendant bought the house. If that is sound, it would make futile all the efforts made by local authorities to house their applicants in a fair way, according to their time of waiting and according to their needs.

We were referred in the course of the argument to *Blackpool Corporation* v. *Locker* (1). There is a passage in the judgment of Scott L.J., which seems relevant. It deals with this question of occupied and unoccupied houses (2) "Before I approach the history of the ways in which in the "present case the corporation, on the one hand, and the "Ministry, on the other, sought to use or misuse the provisions "of the circulars, it is necessary to consider their true legal "effect. As I have already indicated, they seem to me to "have been well drafted for the purpose of effecting a "considerate and fair adjustment between the public duty "of housing the homeless and the private rights of the individual householder in possession, carefully differentiating "between the occupied and the unoccupied, the furnished and the unfurnished, house." If the contention of the corporation is right, Circular 141 of 1946 does not apply to this case and, that being so, as the learned judge has found as a fact, and rightly found, that the house was requisitioned at the time when the defendant entered, it follows that he had no right to enter, that he was a trespasser, and that the corporation were entitled to possession.

DENNING L.J. I agree. In this case the defendant, having served some six years in the army, eventually in the latter part of 1947 bought a house in Erith. When it became vacant he entered into possession. Now the local authority seek to turn him out of his house. I approach this case, as I think it should be approached, in this way, that the local authority—or any person, who relies on Defence Regulations, or special powers of that kind, to turn a man out of his house—must prove the case beyond any possibility of doubt. If the power to do so is in doubt, the benefit should be given to the owner of the house.

The essential feature in the case is that when the defendant bought this house it was requisitioned. It had been requisitioned ever since February, 1941. The history of the matter is this: On July 3, 1940, owing to the number of people likely to be rendered homeless by enemy bombing, the Minister of Health, under the powers of Defence Regulation 51, delegated to local authorities or their clerks power to take possession of buildings for the accommodation of refugees from enemy attack. In pursuance of that power, on February 19, 1941, the Town Clerk of Erith requisitioned this house. He gave notice to the then owner, a Mr. Ashdown, saying that in exercise of the powers delegated to him by the Minister he had that day taken possession of the house, No. 68, Amberley Road. A few days later, on February 27, 1941, the Minister of Health confirmed that action of the local authority. There can be no doubt that that requisition was lawful under the Defence Regulations then in force. In pursuance of it, the local authority put into this house a family which had been rendered homeless by enemy attack. That family remained there until December, 1947. But a few weeks before the family left, the owner of the house agreed to sell it to the defendant: and, when the occupying family quitted on December 16, 1947, the defendant went into possession.

---

(1) [1948] 1 K. B. 349. (2) Ibid. 367.

Between 1940 and 1946 the Minister had delegated extensive powers to local authorities. Some of them are set out in the report of *Blackpool Corporation* v. *Locker* (1). Owing to the very difficult housing situation which existed, the Minister delegated to local authorities the power to requisition unoccupied houses, not only for persons rendered homeless by enemy action, but also for persons who were inadequately housed. After delegating that power by Circular No. 138, dated July 20, 1945, he laid down a number of conditions for the protection of the owners of these unoccupied houses. He said the local authority were to give the owner fourteen days' notice that the house had been requisitioned; and if the owner within those fourteen days notified the local authority that it was his intention to occupy the house, then the local authority were to hold their hand and not proceed with the requisition. In June, 1946, the Minister issued Circular 141. Apparently some owners had been taking undue advantage of the conditions of Circular 138. The owner of a large house, suitable for five or six families, might prevent it being requisitioned at all by saying that he wished to occupy a small part of it himself, as in *Duke of Westminster* v. *Swinton* (2). Accordingly by Circular 141 the Minister said in effect: " Well,

(1) [1948] 1 K. B. 353-6.
(2) [1948] 1 K. B. 524, 526.

"if the owner intends to occupy only a part of the house, "or if he has only got such a small family that the whole "house will not be occupied, then the local authority need "not hold their hand, they need not release the requisition, "but they must allow the owner to occupy a reasonable "part of the house, if he so desires." That, in my opinion, is the true construction of Circular 141. It is simply a modification placed on Circular 138. Whereas previously under Circular 138 the owner of an unoccupied house could, within the fourteen days, prevent the requisition continuing by saying that he intended to occupy it himself, now under Circular 141 he could only so do if he really needed the whole for himself and his family.

Mr. Cleworth, however, argued that Circular 141 was independent of Circular 138: and that, even after the fourteen days had elapsed—indeed, long after the local authority had put a homeless family into occupation—the owner could claim the benefit of Circular 141: and accordingly that, if the owner notified the local authority of his intention to occupy the house, the local authority could not retain possession but had to turn out the family and give up the house to the owner. That would mean, as indeed Mr. Cleworth was forced to admit, that any person, who had sufficient money, could buy a requisitioned house and determine the requisition by notifying the local authority that he intended to occupy it himself. If that were correct it would destroy the whole policy of housing the homeless. It would mean that one person by his superior wealth would be able to turn out others who were not so well off. That is not the true construction of the circular; and it has never been so understood. The defendant himself bought this house, more cheaply than he otherwise would, solely because it was requisitioned. In a letter to the Ministry on August 20, 1947, he wrote: "This house . . . . "is being sold to me for 1,050*l.*; if it were sold with vacant "possession it would most probably fetch 1,800*l.*" He seeks now to be in as good a position as if he had bought with vacant possession. I am afraid he cannot do that.

In the course of the argument I asked Mr. Simes whether the local authority had any right to retain the house after the occupying family had quitted. The local authority had put that family into occupation because they were rendered homeless by enemy attack. Now that the family had left, were not the local authority bound to give the owner the opportunity of occupying his own house in preference to anyone else? In other words, when a local authority are authorized to requisition a house for a certain purpose, does not their power cease and the requisition determine, automatically, as soon as that purpose ceases? Mr. Simes gave answers to these questions which convinced me. He agreed that if it could be affirmed that the original purpose had in fact ceased, the local authority would prima facie have had no right to continue the requisition, but would have had to make a fresh requisition. This is recognized by Circular 138 itself which says that, if the purpose of the requisition is changed, as, for instance, from warehouse purposes to housing purposes, the local authority ought to go through the procedure afresh of giving the owner fourteen days' notice and so forth. In other words, the local authority ought to make a new requisition for the new purpose. If that had been necessary here, the defendant, after the family had quitted, would have received the usual fourteen days' notice and would have been entitled, within the time, to occupy the house himself. The answer, however, which Mr. Simes gave was that in this case the original purpose had not ceased. It is well-known that Erith was heavily bombed, and the local authority may still require the house in order to house families rendered homeless by enemy attack. Mr. Simes gave another answer also. He pointed out that in January, 1946, by Circular 5 of 1946, the Minister said in effect: "All houses at present "requisitioned by local authorities may in future be used "as a general pool of accommodation for the inadequately "housed." That meant that thenceforward the houses which had been requisitioned by the local authorities for the early purposes, such as for refugees from enemy attack, could be retained by them for the general purpose of the inadequately housed. The Minister therefore by that Circular No. 5 of 1946 authorized the local authority to retain the houses for the inadequately housed without making a fresh requisition. I think that answer is correct also. It was clearly within the power of the Minister to change the purpose without a fresh requisition (*Progress Building Ld.* v. *Westminster City Corporation* (1)), and so, too, he was within his rights in authorizing the local authority to retain the houses for the inadequately housed (*Gordon, Dadds and Co.* v. *Morris* (2)). So long as the local authority retain the house for that purpose,

(1) [1947] 1 All E. R. 684.

(2) (1945) 62 T. L. R. 29.

the defendant has no right to be there. He must wait until the local authority release it from the requisition.

For these reasons I am of opinion that this appeal should be dismissed. The local authority have brought themselves within the terms of the Defence Regulation enabling requisition of this house. That requisition has never been determined and the owner has himself no right to possession.

VAISEY J. It is perhaps, at first sight, surprising that the true owner of the property in this case is now in no better position that any other deserving and meritorious person who is, as he is, homeless, either owing to bomb damage or to the prevailing housing shortage otherwise occasioned. I say at first sight, but only at first sight, because in my judgment the whole scope and intention of the relevant legislative provisions is to place requisitioned property at the unrestricted disposal of local authorities as the accredited delegates of the Minister of Health. I find Circular 141 of 1946, to which my Lord has referred, somewhat obscure in its expressions and not altogether easy to interpret in conjunction with the other circulars of which it forms part, but I have come to the conclusion that that circular really applies only to the initial stages of a requisition. Here, in my judgment, the property was validly requisitioned in 1941 and never ceased to be requisitioned property. I think Circular 141 has no application to the circumstances of the present case.

There is one point which has been adverted to in argument to which I think no reference has been made by my Lords, and it is this: the fact that circular 141 of 1946 was included in the list of Circulars put forward by the corporation as relevant to the issue in the action and in this appeal cannot possibly operate as a kind of estoppel so as to preclude the corporation from alleging, as they now do, that it has nothing to do with the case.

I agree, for these reasons and for the reasons given by my Lords, that this appeal fails.

Appeal dismissed.

Solicitors for the defendant: *H. E. Thomas & Co.*

Solicitors for the corporation: *Sharpe, Pritchard & Co. for J. A. Crompton, Town Clerk, Erith.*

C. G. M.

MACKLEY *v.* NUTTING.

C. A.

1949
Jan. 12, 13, 21.

Bucknill, Cohen and Asquith L.JJ.

Landlord and tenant—Estoppel—Death of tenant intestate—No grant of administration—Benefit of tenancy vested in President of Probate, Divorce and Admiralty Division—Landlords purport to grant widow of deceased tenant a tenancy of premises—Death of widow intestate—Grant of administration to her daughter—Daughter continues in possession of premises and pays rent—Plaintiff, successor in title to original lessor, serves notice to quit on President and sues the daughter for possession—Plaintiff estopped by virtue of predecessors' grant of contractual tenancy to widow—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17) *s.* 12, *sub-s.* 1 (*g*).

N., the contractual tenant of a dwelling-house, controlled by the Rent Restriction Acts, died in 1935, and, since he had made no will and no grant of administration of his estate was obtained, by s. 9 of the Administration of Estates Act, 1925, the benefit of his tenancy became and remained vested in the President of the Probate, Divorce and Admiralty Division. The tenant's widow, Mrs. N., remained in occupation of the house and paid the weekly rent to the landlords W. and M. Ld. until her death intestate on September 11, 1946. Miss N., her daughter, took out letters of administration to her mother's estate, which were granted on March 27, 1947. On May 5, 1947, the plaintiff, who had acquired the freehold reversion in the premises from W. and M. Ld. gave notice to the President to determine the tenancy. Possession of the premises being refused by Miss N. to the plaintiff, he sued for recovery of possession. Evidence was given by a director of W. & M. Ld. that at the time of N.'s death, they did not want to turn out Mrs. N. from the premises and would not have done so, if they could.

Held, (1.) that at the death of N. par (*g*) of sub-s. 1 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, did not apply; (2.) that the intention of W. and M. Ld. and of Mrs. N. at the time of N.'s death was to create a new contractual tenancy in favour of Mrs. N., which W. and M. Ld. were estopped from denying; (3.) that Mrs. N., had she been alive, could have relied on that estoppel against the plaintiff and that Miss N. could do so as her legal personal representative; and (4.) that this right to rely on the estoppel became a tenancy when the interest of the President was determined by the notice to quit (*Webb* v. *Austin* (1844) 7 M. & G. 701, at p. 725).

APPEAL from Leicester county court.

Wood and Martin Ld. let to Mr. Nutting, the defendant's father, a dwelling-house, No. 274, Harrison Road, Leicester, on a weekly tenancy at a rent of 12*s.* 6*d.* a week. Mr. Nutting died intestate at a date believed to be in 1935, while still a contractual tenant of the premises. He had made no will and no grant of administration to his estate was obtained and so by virtue of s. 9 of the Administration of Estates Act, 1925, the benefit of his tenancy became and remained vested in the President of the Probate, Divorce and Admiralty Division. Mrs. Nutting, the tenant's widow, remained in possession of the house and continued to pay the weekly rent to Wood and Martin Ld. until her death intestate on September 11, 1946. The defendant, Miss Nutting, who had lived in the premises first with her two parents and then with the survivor, remained in possession. On March 27, 1947, letters of administration of her mother's estate were granted to her. Down to that date, no notice to determine the tenancy had been given to anyone, but on May 5, 1947, the plaintiff, who had acquired the freehold reversion in the premises, gave notice to the President, purporting to determine the tenancy which had become vested in him on Mr. Nutting's death. The Treasury Solicitor replied: "I have been "instructed by the President of the Probate, Divorce and "Admiralty Division to reply to your letter of May 5, and I "return the copy of the notice to quit duly endorsed. That "may be sufficient for your purposes, but I think I should "point out that, in my opinion, the nature of the vesting "in the President of the property of an intestate, by virtue "of s. 9 of the Administration of Estates Act, 1925, is not "such as to impose on him any liability in respect of the "property, and, in those circumstances, the notice to quit "appears to me to be misconceived so far as the President "is concerned."

The plaintiff demanded possession from the defendant, which she refused. The plaintiff thereupon brought this action. Mr. Wood when giving evidence as to the position of Mrs. Nutting after her husband's death, said that Wood and Martin Ld. permitted Mrs. Nutting to stay on as tenant. They did not want to turn her out. He said: "Speaking "as a director of the company, I did not want to turn her "out, I would not have turned her out if I could." The county court judge made an order for possession. The ratio decidendi of his judgment was that the widow was a statutory and not a contractual tenant; and that the defendant could have no rights under the statute: since the effect of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the right of a tenant to remain in possession after notice to quit had been served was exhausted by the widow's statutory tenancy.

The defendant appealed, and when the case came before the Court of Appeal in July, 1947, that court directed that the case should stand over in order that counsel might be instructed by the Treasury Solicitor to assist the court as amicus curiæ.

Mrs. Y. Frazer for the defendant. When Nutting died, since he was a contractual tenant whose tenancy passed on his death to a representative other than his widow or any member of his family residing with him at his death. Mrs. Nutting did not obtain the protection of s. 12, sub-s. 1 (*g*) of the Act of 1920. She did not become a statutory tenant. See the decisions of *Thynne* v. *Salmon* (1) and *Smith* v. *Mather* (2). The reasoning of the county court judge, therefore, cannot be supported. It is clear from the evidence of Mr. Wood of Messrs. Wood and Martin Ld., the landlords at the time of Nutting's death, that they intended and purported to grant a contractual tenancy of the premises to Mrs. Nutting, the widow, which she accepted. She continued to pay rent to the landlords for the tenancy she considered she held until the date of her death on September 11, 1946. That being so, these landlords would have been estopped from denying the tenancy to Mrs. Nutting and, had she been alive, she could have relied on the estoppel against the plaintiff. See para. 572 at p. 505 of vol. 13 of Halsbury's Laws of England (2nd ed.) and Spencer Bower on Estoppel by Representation, para. 176 at p. 151. Miss Nutting also can rely on the estoppel as being her mother's legal personal representative, and when the interest of the President in the premises ceased by reason of the notice to quit given by the plaintiff on May 5, 1947, her right to rely on the estoppel became a tenancy: see *Webb* v. *Austin* (3). There should have been no order made for the recovery of possession of these premises.

Victor Russell was called on by the court as amicus curiæ. The tenancy became vested in the Probate Judge, that is the President of the Probate, Divorce and Admiralty Division where it rested by virtue of s. 9 of the Administration of Estates Act, 1925. The President obtained no beneficial interest in the premises and he paid no rent therefor. He

(1) [1948] 1 K. B. 482.
(2) [1948] 2 K. B. 212.
(3) (1844) 7 M. & G. 701 at p. 724.

obtained no right by the vesting other than the right to appoint an administrator. The tenancy passed to him as it would have passed to his predecessor, the Ordinary, before 1857 and remained inchoate until an administrator was appointed. He is a trustee to dispose of personal property in manner appointed by law, but in practice no duties or liabilities are imposed on him. See 13 Ed. 1, c. 19, and 31 Ed. 3, st. 1, c. 11. The Ordinary's sole task was to appoint an administrator of the estate of the intestate and, if necessary, to call for an account. I have found no case which shows what happened when the Ordinary did not appoint an administrator and I have found no case on s. 9 of the Act of 1925. There is no limitation as to the amount which may vest in the President under s. 9 and the vesting extends to real and personal estate. See also ss. 3 and 4 of the Court of Probate Act, 1857. A comparable vesting is to be found in s. 20, sub-s. 1, of the Administration of Estates Act, 1925, where an infant is appointed sole executor of a will. Administration with the will annexed is to be granted to his guardian or another appointed by the court until the infant attains the age of twenty-one years, when, and not before, probate of the will may be granted to him. Whilst this tenancy was vested in the President, he could not let it to another.

Stinson for the plaintiff, the landlord. I agree with what has been said by Mr. Victor Russell as to the position of the Probate Judge. He and he alone was the tenant, until administration was granted, and his tenancy could only be terminated in one of two ways: (1.) by the grant of letters of administration, or (2.) by notice to quit. He did receive notice to quit on May 5, 1947, and until that time the Probate Judge was the tenant of these premises. Mrs. Nutting, therefore, was not the tenant of the premises.

The point of estoppel was not taken in the county court and so cannot be taken on appeal: *Smith* v. *Baker & Sons* (1). The contention put forward for the defendant in the county court was that her mother was in fact the contractual tenant of Messrs. Wood and Martin Ld.

I cannot contend, in view of the decisions of *Thynne* v. *Salmon* (2) and *Smith* v. *Mather* (3), that the reasoning of the county court judge can be upheld; but his decision was right. On the death of N., the tenancy became vested in

(1) [1891] A. C. 325.
(2) [1948] 1 K. B. 482.
(3) [1948] 2 K. B. 212, 215-6.

the Probate judge. No grant of administration was made by him until May, 1947, when he received notice to quit. No tenancy could co-exist with that of the Probate judge and it has not been suggested that any tenancy of these premises was created after May, 1947. In *Smith* v. *Mather* (1), Somervell L.J. said: "Tucker L.J., in the course of his "judgment"—in *Thynne* v. *Salmon* (2)—"pointed out that "if there is a relative of the tenant who comes within the "definition in para. (*g*), assuming 'tenant' to cover a contrac-"tual tenant, and there is also someone in whom the "contractual tenancy has vested under a grant of letters of "administration, or under a will, there will be, if the residing "relative can claim to be a tenant under para. (*g*), two tenants, "two persons presumably liable to pay the rent and entitled "to occupation or possession of the house and so on, and "that that is really an impossible position which the legislature "cannot have contemplated." That passage concludes this case in the landlord's favour. There cannot be two tenancies of the same premises co-existing at the same time. There was here, therefore, only one, that of the Probate judge.

As to the point taken that the landlord is estopped from denying the tenancy of Miss Nutting, not only was it not taken before the county court judge but it has never been pleaded. It was put forward for the first time before the Court of Appeal. Matters which show that an action is not maintainable must be pleaded. See as to this in the High Court, R. S. C. Or. 19, r. 15. There can be no barring of a statute by estoppel.

Mrs. Y. Frazer replied.

BUCKNILL L.J. I will ask COHEN L.J., to give the first judgment.

COHEN L.J. When the county court judge gave his judgment he had not the advantage of the guidance given by the decisions of this court in *Thynne* v. *Salmon* (1) and *Smith* v. *Mather* (3). The first of these decisions lays down that the protection given to the widow, or to a member of the family, of a tenant by para. (*g*) of sub-s. 1 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not apply where the tenancy, which was vested in a contractual tenant at his death passed by his will, or on his intestacy to some person other than his widow or a member of his family residing

(1) [1948] 2 K. B. 212, 215–6.
(2) [1948] 1 K. B. 482.
(3) [1948] 2 K. B. 212.

with him at the time of his death. The second decision showed that there is no logical distinction between the position of the President and that of any other person in whom the tenancy is vested, and it follows, therefore, that para. (*g*) cannot apply where the tenancy is vested in the President on the intestacy of the deceased, at any rate, unless on that intestacy the widow is absolutely entitled under s. 46, sub-s. 1 (v) of the Administration of Estates Act, 1925. This being the position, counsel for the landlord properly admitted that he could not support the decision of the county court judge on the basis of his reasoning. He contended, however, that Somervell L.J., in *Smith* v. *Mather* (1) concluded the present case in the landlord's favour when the Lord Justice said (2): "Tucker L.J. in the course of his judgment"—in *Thynne* v. *Salmon* (3)—"pointed out that, if there is a relative "of the tenant who comes within the definition in para. (*g*), "assuming 'tenant' to cover a contractual tenant, and there "is also someone in whom the contractual tenancy has vested "under a grant of letters of administration or under a will, "there will be, if the residing relative can claim to be a tenant "under para. (*g*), two tenants, two persons presumably, "liable to pay the rent and entitled to occupation or possession "of the house, and so on and that that is really an impossible "position which the legislature cannot have contemplated." If said counsel for the landlord, this court were to take the view that Mrs. Nutting was a contractual tenant, we should be assuming the co-existence of two tenants: one, Mrs. Nutting, and the other, the President, both presumably entitled to possession of the house, and that he said was the position which Somervell L.J. regarded as impossible. This argument seems to me, however to ignore the context in which the observations of Somervell L.J. were made. What the court were there considering was the construction of s. 12 of the Act of 1920, and the court held that, if there are two alternative constructions, it is reasonable to adopt that which will avoid the inconveniences to which Somervell L.J. referred. There the court was not considering the question which we have to consider, which is in part one of fact and in part one of law. The question of fact is: what was the bargain (if any) between the landlords and Mrs. Nutting? The question of law is, assuming that the intention of the parties to that bargain was to create a tenancy; what was the effect of the bargain having regard to the outstanding interest vested in the President ?

---

(1) [1948] 1 K. B. 212.

(2) Ibid. 215–6.

(3) [1948] 1 K. B. 482.

On the question of fact the only possible conclusion from the evidence is that the intention of the parties was to create a tenancy on the same terms as that under which Mr. Nutting had held. Counsel for the landlords, however, said that effect could not be given to that tenancy because of the interest of the President. Counsel for the defendant sought to meet this argument by saying that the landlord claiming, as he did, through Messrs. Wood and Martin Ld. were estopped from denying the tenancy. Counsel for the landlords then took the objection that this point had not been raised before the county court judge, and was not, therefore, open before us. He relied on the well-known observations of Lord Halsbury in *Smith* v. *Baker & Sons* (1) : " This was an action originally " tried in the county court, and it is very important to bear " in mind that only a limited appeal is allowed by law in actions " so tried. There is no power to review the decision of fact " arrived at in the county court by any other tribunal than " the county court itself. A matter of law can be made the " subject of appeal, but then only when the point has been " raised at the trial before the learned judge. That question " was decided in *Rhodes* v. *Liverpool Commercial Investment* " *Co.* (2). In *Seymour* v. *Coulson* (3) the principle was " affirmed that the point of law must be taken ; and finally " in *Clarkson* v. *Musgrave* (4) where all the cases were reviewed, " it was established (and, I think, has been accepted ever since) " that the raising of the point of law at the trial is a condition " precedent to any appeal from the decision of the county " court. I think there are good reasons for the enactment " which has so limited an appeal, and, in truth, even where " written pleadings render such precautions as the statute " has enforced in the county court less necessary, the same " precaution has been constantly enforced where applications " for a new trial have been made in the superior courts. It is " obvious that it would be unjust to one of the parties if the " other could lie by and afterwards, having failed on the " contention that he, in fact, set up, be permitted to rely " on some other point not suggested at the trial, but which " if it had been suggested might have been answered by " evidence : see *MacDougall* v. *Knight* (5)."

(1) [1891] A. C. 325, 333.
(2) (1879) 4 C. P. D. 425.
(3) (1880) 5 Q. B. D. 359.
(4) (1882) 9 Q. B. D. 386.
(5) (1889) 14 App. Cas. 194.

C. A.
1949
MACKLEY
v.
NUTTING.
Cohen L.J.

It is true that the point of estoppel was not dealt with in the court below, but that was because of the erroneous view that the county court judge took of the law, which resulted in his not considering what the intention of the parties was; in these circumstances the question of estoppel never arose. Accordingly, it seems to me that a grave injustice would be done to the defendant if she were now to be debarred from raising the question of estoppel. On the other hand, I cannot see that any injustice would be done to the landlord, if she were allowed to raise it. It was clear in the pleadings that the defendant was alleging a contract of tenancy between the landlords, Messrs. Wood and Martin Ld., and her mother and counsel for the plaintiff, the landlord, was quite unable to suggest any further evidence which he might have been able to adduce if estoppel had been expressly pleaded or raised in argument before the county court judge.

The legal position, on the assumption that Messrs. Wood and Martin Ld. purported to grant a tenancy to Mrs. Nutting is, in my opinion, correctly stated in Halsbury's Laws of England (2nd ed.), vol. 13 at p. 504. Paragraph 572 is in these terms: "Generally, a tenant is estopped from disputing "the title at the time of the demise of the landlord by whom "he has been let into possession; but this estoppel has no "application even while the tenancy exists, when the question "of title arises between the parties, not in the relationship "of landlord and tenant, but of vendor and purchaser. The "doctrine of estoppel which operates between landlord and "tenant is not confined to leases by deed, and applies to "tenancies from year to year, at will, or on sufferance, as well "as to leases for years; and anyone holding under a tenant, or "defending as landlord in an action of ejectment, is bound "by it. Similarly"—and this is the important passage—"the lessor is estopped from repudiating a lease under "which possession has been given as a tenancy which he "has acknowledged, and the assignee of the lessor's interest "is estopped from denying anything which the lessor is "estopped from denying." There is a note (*r*) on p. 505 which is in these words: "This is an example of the dictum "that estoppels must be mutual and reciprocal." Mrs. Nutting had she been alive could, therefore, clearly have relied on estoppel against the landlords. Does that right pass to the defendant, Miss Nutting as her legal representative? In my opinion, it does. See Spencer Bower on Estoppel by Representation, para. 176 at p. 151: "Speaking generally, "on the death or disability of the representee, the persons "who in right of him or his estate would be entitled to enforce "any contract made with him are the persons who can take "advantage of any rule of evidence, and, therefore, of any "estoppel, which would be available to the representee if "alive, or free from disability. Thus, the executor, adminis-"trator, heir or devisee (as the case may be) of a deceased "representee succeeds, in this as in any other respects, to the "rights which that representee had at the moment of his "death."

I would add that, the rights having passed to the defendant, her interest in the premises, which on her mother's death was only a right to enforce the estoppel, became a tenancy when the interest of the President was determined as the result of the notice to quit dated May 5, 1947. See *Webb* v. *Austin* (1), where Tindal C.J. delivering the judgment of the court said: "The doctrine on this subject, as it has been "generally understood by the profession, may be collected "from Preston's Treatise on Abstracts (vol. 2, p. 210), "and the authorities there cited. That general understanding "appears to be that 'an indenture of lease, or a fine sur "'concessit, for years, will be an estoppel only during the term. "'It first operates by way of estoppel, and finally, when the "'grantor obtains an ownership, it attaches on the seisin "'and creates an interest, or produces the relation of landlord "'and tenant; and there is a term *commencing* by estoppel, "'but *for all purposes* it becomes an estate or interest. It "'binds the estate of the lessor, etc., and therefore continues "'in force against the lessor, his heirs, etc. It also binds "'the assigns of the lessor and of the lessee'."

For these reasons I would allow the appeal.

BUCKNILL L.J. I agree that the appeal should be allowed for the reasons given by Cohen L.J.

ASQUITH L.J. I also agree.

Appeal allowed.

Solicitors for the tenant: *Wilberforce Allen and Bryant for A. H. Headley, Leicester.*

Solicitor for the amicus curiæ: *The Treasury Solicitor.*

Solicitors for the landlord: *Wright and Bull for Wright and Freeman, Leicester.*

C. G. M.

---

(1) 7 M. & G. 701, 724.

Affirmed.
[1951] A. C. 88

Affirmed. H.L. [1950] 2 All E.R. 486.

C. A.

1949
Mar. 3, 4;
Apr. 12.

Tucker,
Asquith and
Singleton L.JJ.

CAMINER AND WIFE *v.* NORTHERN AND LONDON INVESTMENT TRUST, LIMITED

Negligence—Nuisance—Fall of tree on highway—Injury to motorists driving on highway—Fall of tree attributable to root disease—No indication of disease—Failure to lop—Duty of occupier of land with regard to trees thereon.

The defendants were the occupiers of a building on land adjoining a highway. In the forecourt of the building was an elm some 130 years of age with a large but not abnormal crown of foliage, which had not been lopped or trimmed for many years. On a gusty, but not abnormally windy day, the tree fell across the highway, injuring the plaintiffs who were passing at the time in a motor car. After it had fallen, it was found that the elm had a disease of the roots which could not be detected while it was still standing. The fall of the tree was attributed in part to the condition of the roots, and in part to the heavy crown on the tree, but neither of these causes, by itself, would be likely to account for its fall on the day in question. Evidence was given that elm trees were of a particularly treacherous character and that they should be periodically inspected and trimmed or lopped. In an action by the plaintiffs for damages for negligence or nuisance:

Held, that whether the claim was based on negligence or nuisance the plaintiffs must establish either that the defendants knew of the danger or ought to have known of it. "Ought to "have known" could not mean more than "would have known "if they had taken the precautions which a reasonable landowner "would take." The presence of disease being eliminated as an element of danger of which the defendants were or should have been aware, and the plaintiffs having failed to show that there was something in the appearance of the tree which should have indicated to the defendants the probability of danger, the claim must fail.

Decision of Lord Goddard C.J. [1948] W. N. 489 reversed.

Appeal from Lord Goddard C.J.

On April 7, 1947, the plaintiffs, a Mr. Caminer and his wife, were driving in a motor-car along Prince Albert Road, St. John's Wood. The day was fine with a wind blowing in strong, squally gusts from time to time. As they were passing a block of flats known as St. James' Close, of which the defendant company were the occupiers, a large elm tree which stood in the forecourt of the flats fell on the plaintiffs' car, injuring both of them. The defendants became the lessees of the flats in 1940 and the premises were requisitioned by the Air Ministry from June, 1941, until April, 1946, when they were returned to the defendants. The defendants thereupon began to repair some bomb damage which had been done to the site on which their building stood and to execute other repairs, but there was nothing in the damage which had been done, or in the repairs executed, to suggest that either had any connexion with the fall of the tree. The tree was a large, well-grown elm of an age of from one hundred and twenty to one hundred and thirty years, and after its fall it was found to be suffering from a disease not uncommon in elm trees, known as elm butt rot, which affects the root of the tree and in the case of the tree in question was probably of long standing and must have been in the roots of the tree long before the defendants came into possession of the property. While the tree was standing there was no indication above ground that it was suffering from the disease. The tree carried a large, though not abnormal, crown of foliage, and had not been trimmed or lopped for many years. Expert evidence was given to the effect that elms are shallow-rooted trees and that they are notoriously treacherous and apt to fall. It was also stated that elm trees should be inspected every five to seven years and trimmed from time to time. Shortly before the accident occurred, the firm of estate agents who managed the property for the defendants, gave orders to a firm of contractors to lop and top the trees in St. James' Close, with a view to tidying the appearance of the property and admitting more light to the building. The work was in progress and all but two trees, the one that fell and one other, had been completed, and, but for the intervention of a bank holiday all would have been topped or pollarded before the date of the accident. The plaintiffs claimed damages from the defendants on the ground of negligence or nuisance.

1948. Nov. 26. Lord Goddard C.J., in a considered judgment said: Having carefully considered the evidence of both experts and the evidence of the timber merchant or contractor who was called before me, I have come to the conclusion that the fall was due to a combination of circumstances, namely, the action of the wind upon a tree bearing a large crown or tophamper, the roots of which had rotted to a greater or lesser extent. Had it not been for the condition of the roots, it is probable that the wind was not heavy enough on the day in question to cause the tree to fall. On the other hand, had the tree not been bearing the amount of tophamper that it in

C. A.

1949

Caminer and Wife v. Northern and London Investment Trust, Ld.

fact was, and if it had been topped or pollarded, there is no reason to suppose that the tree would have fallen when it did, and it might have stood for a very considerable time.

For the purpose of this case, it seems to me to be immaterial whether the cause of action is laid in negligence or in nuisance, for it is now well-settled that the owner of a property upon which a nuisance exists, but which has not been caused by him, is not liable for injury caused thereby, unless he omits to remedy it within a reasonable time after he became aware, or ought to have become aware, of the danger: *Noble* v. *Harrison* (1); *Sedleigh-Denfield* v. *O'Callaghan and Others* (2).

This property was managed for the defendants by a firm of London estate agents, who had, shortly before the accident, given orders to a contractor, who was called before me, to lop and top the trees which were in the forecourt of St. James' Close. This work had progressed some way, and, had it not been for the Easter holidays, this tree, which they had left along with one other to the end, would probably have been pollarded or topped before the day in question, and, in that case, this unfortunate accident would not, in my opinion, have happened. I have, therefore, to consider whether the defendants are responsible for allowing this tree to be in the condition that it was, and whether they had taken steps within a reasonable time to remedy what, I think, was a danger. As I have said, elms are notoriously treacherous trees. Whether I ought to impute this knowledge to the defendants or their agents may, perhaps, be open to question, but it cannot, I think, be doubted that it is the duty of all owners of property to manage it in accordance with the principles of good estate management, so that their property may not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity, and, if good estate management involves the inspection and trimming of trees from time to time, it cannot, I think, be doubted that there is a duty on landowners to carry out these operations. The expert who was called by the defendants, and who gave his evidence with a frankness which was most refreshing, said that elm trees should be inspected every five to seven years, and that if this tree had been lopped it is very unlikely that it would have fallen when it did. If, therefore, principles of good estate management require periodical inspection and cutting, it is not, I think, open to an occupier of property who maintains on

(1) [1926] 2 K. B. 332. (2) [1940] A. C. 880.

his land trees which immediately adjoin or are very close to a highway, to say "Well, I did not know that I ought to have "done it." I was told that the elms on the other side of the road had been pollarded. This tree, as I have already said, had probably never been trimmed or cut at all; certainly not for a great number of years. The defendants' agents had given instructions for these trees to be cut, it was said, because the repair of the war damage had been finished and it was thought there should be a general tidying up of the property. I must, however, point out that the defendants had had ample opportunity of topping these trees both before the requisitioning by the Air Ministry and since they have regained possession in April, 1946.

That there must be a duty to take precautions with regard to trees adjoining a highway cannot, I think, be doubted. What would amount to an adequate performance of that duty varies, no doubt, with the circumstances. It may well be that trees in the vicinity of a country lane would not require to be inspected or cut so often as those which adjoin busy thoroughfares, and it must, I think, be remembered that while, no doubt, some squares in London are planted with elms, they are not a common feature of the landscape in the ordinary London street. The defendants strongly contended that, though an expert might be aware of the danger or of the necessity of taking such precautions as those to which I have referred in the way of pollarding or lopping, the necessity would not be apparent to an ordinary landowner, and, in this connexion, reliance was placed on *Brown* v. *Harrison and Another* (1) in which the Court of Appeal approved of a ruling by Stable J. that the test was whether the danger was one which was apparent to an ordinary layman and not only to an expert. That, however, was a case where a dead tree fell and it is true that in that case the judge found that it was apparent to the owner that the top boughs were dead and therefore likely to blow down. In this case the evidence satisfies me that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering or near to the road to top or pollard them as an ordinary incident of good estate management. I may say that this was the opinion of Singleton J. in *Cunliffe* v. *Bankes* (2). He concluded his judgment by saying: "Those who have property of this kind "have to realize there is a duty to the public." He emphasized that the duty was there, though in that case he held that the owner had adequately performed the duty by periodical inspection. In this case, I think that the defendants did not realize their duty, and, though with another object in view, namely, to get a tidy appearance, they had begun to do what good management required, unfortunately they had not done so in time.

---

(1) (1947) 177 L. T. 281.

(2) [1945] 1 All E. R. 459.

Consequently, in my opinion the plaintiffs are entitled to recover, and there will be judgment for the agreed amounts of 550*l.* in the case of the male plaintiff and 850*l.* in the case of his wife.

The defendants appealed.

Marven Everett for the defendants. There was no evidence in the court below of any breach of duty by the defendants. They are acquitted of negligence in not ascertaining the existence of the root disease and the only case made against them with any degree of success was based on the alleged large crown of the tree. That, however, was founded upon the evidence of a witness who was not a reliable witness, and that case is very thin. It is submitted that the evidence as to the size of the crown was not such as to justify the finding of the Lord Chief Justice that it should have put a reasonable landowner upon inquiry. The duty of a landowner in respect of trees on his property was laid down by the Court of Appeal in *Brown* v. *Harrison and Another* (1), approving the statement of the law made by Stable J. in the following terms : " Having " regard in each particular case to the circumstances of that " particular case, if there is a danger which is apparent, not " only to the expert, but to the ordinary layman, which the " ordinary layman can see with his own eyes, if he chooses to " use them, and he fails to do so, with the result that injury is " inflicted, as in this case, upon somebody passing along the " high road, the owner is in those circumstances responsible, " because in the management of his property he has not acted " as a reasonable normal landowner would act." Judged by that standard the defendants cannot be held responsible, since there was no danger apparent to the eyes of a layman which he could see with his own eyes if he chose to use them. It is also well settled law that the owner of a property on which a nuisance exists is not liable unless he knows or ought to have known of the danger : see *Noble* v. *Harrison* (2). The evidence was that this was a well-grown, healthy-looking tree, with a normal crown, and that it was not leaning or top-heavy. There was nothing apparently wrong with its trunk and therefore nothing to put the defendants on their guard or to indicate that it was their duty to bore to ascertain the condition of the roots. There was no specific finding by the Lord Chief Justice of negligence.

---

(1) 177 L. T. 281.

(2) [1926] 2 K. B. 332.

Fox-Andrews K.C. and *Rees-Davies* for plaintiffs. It is clear that this tree ought to have been lopped, having regard to the evidence that the elm is notoriously a treacherous and dangerous tree. The judgment of the Lord Chief Justice is in complete harmony with the language in *Cunliffe* v. *Bankes* (1). His finding is that the size of the crown, coupled with the position of the tree, close to the highway, was such as to make it clear to a person with reasonable knowledge of trees that it ought to be lopped, and that that ought to have been apparent to the defendants or their agents as from 1940. In *Brown* v. *Harrison* (2) this court was dealing with an entirely different state of affairs. Taking the evidence as a whole it is submitted that there is no justification for interfering with or setting aside the decision of the court below. There is a nexus established between the failure to inspect and lop the tree and the accident and the plaintiffs have proved negligence on the part of the defendants.

April 12. TUCKER L.J.: The Lord Chief Justice found that the fall of the tree was due to a combination of circumstances, namely, the action of the wind upon a tree bearing a large crown, the roots of which had rotted to a greater or less extent. He added: "Had it not been for the condition of the roots, "it is probable that the wind was not heavy enough on the "day in question to cause the tree to fall. On the other hand, "had the tree not been bearing the amount of tophamper "that it in fact was, and if it had been topped or pollarded, "there is no reason to suppose that the tree would have fallen "when it did, and it might have stood for a very considerable "time."

Save in one respect, viz., the size of the crown, none of the findings of fact were challenged before us. The finding with regard to the crown was, however, strongly criticized. It was said that it was based entirely on the evidence of a witness named Dunk on his being recalled. It was pointed out that the Lord Chief Justice had apparently rejected the evidence of this witness on an important issue in the case, namely, whether or not the roots had been cut before the fall, and that Dunk, who was the garden superintendent of the St. Marylebone Borough Council, had never made any adverse report on this tree, although it was part of his duty to inspect the trees in the neighbourhood for the purpose of causing the removal of branches overhanging the roadway lower than seven feet from the ground, and he agreed that he would report any tree which he regarded as a potential danger. Furthermore, when first called he had been asked no question as to the size of the crown. No other witness who had seen the tree growing said the crown was large or considerable, and the suggested extent of thirty-five feet was only put in cross-examination to one witness, viz., Mr. Prosser, who had a good view of the tree from his flat every day. He did not agree and said there was no evidence of the tree being top heavy. If the judgment had been based on the ground that the crown of the tree was of abnormal size, so as to make it apparent to a layman that it was a potential danger, I should have been of opinion that the evidence was not sufficient to justify such a finding. A study of the judgment, however, satisfies me that it was not based on this finding. The Lord Chief Justice does not say it was abnormal, merely that it was large or considerable, which I take to mean no more than that it was the kind of crown which an elm tree of this age, which had never been lopped, might be expected to carry. The real ground of the decision is, I think, to be found in the following passage in the judgment. [His Lordship read the passage from the judgment of the Lord Chief Justice set out at pp. 66–68 ante and continued:]

---

(1) [1945] 1 All E. R. 459.

(2) 177 L. T. 281.

There can, I think, be no doubt, since the decision in *Noble* v. *Harrison* (1) that whether the claim is based on nuisance or negligence the plaintiff in such an action as this must establish either that the defendant knew of the danger or that he ought to have known of it. " Ought to have known " cannot mean more than " would have known if he had taken the precautions " which a reasonable landowner would take." There are many things the doing of which may be in accordance with good estate management, but the failure to perform which I venture to think may not amount to negligence. I doubt therefore whether it assists the solution of the problem to test it in the terms of good estate management, unless this means no more than doing that which a reasonable landowner would know was necessary for the protection of the public. In the present case the defendants did not know of the existence of the danger, and the only question is whether they omitted to take some step which a reasonable landowner would take and which if taken would have prevented the continuance of the danger. An elm, though notoriously a shallow-rooted tree, has not yet been placed in the category of things which a man keeps on his property at his peril, and though it may be wise, and in accordance with good estate management, to lop elms every five or seven years, I do not think the evidence in the present case established that elms one hundred and twenty or one hundred and thirty years old (which is less than half of the normal life of an elm) normally becomes dangerous after seven years without lopping, so that it can be said that on proof of failure to lop for seven years a prima facie case of negligence is established, which can only be rebutted if the defendant can show that he omitted to lop as a result of advice received after expert examination. I am accordingly of opinion that, once the presence of disease is eliminated as an element of which the defendants were or should have been aware, the plaintiffs, in order to succeed, must show there was something in the appearance of this tree which should have indicated to the defendants the probability of danger. In this I think they failed. No witness who had seen the tree when growing said it looked dangerous. Two of these witnesses—Chipping and Dunk—were men who had had many years' experience of trees. The evidence of Chipping is, I think, of great importance. He is a timber and haulage contractor who has been engaged in timber felling since 1915. He was actually engaged in lopping the trees on this property when the accident occurred. He saw nothing dangerous in the appearance of this tree. There is no indication in the judgment under appeal that the Lord Chief Justice took an adverse view of this witness. This evidence of an expert, if reliable, would seem to absolve the defendants, who are not experts, from negligence in failing to appreciate the existence of danger, and furthermore would appear to lead to the conclusion that if they had sought advice from this expert they would have remained in ignorance. They cannot be required to call in an expert with the high qualifications of Mr. Le Sueur, but even if he had been consulted, although it is highly probable he would have advised lopping, I do not think it is by any means certain he would have condemned the tree as dangerous.

---

(1) [1952] 2 K. B. 332.

The real cause of this unfortunate accident was the presence of elm butt rot, which disease had taken an unusual course with the result that there was nothing to indicate its presence to a layman or an expert. Once the defendants are absolved from responsibility in this respect, I do not think the evidence is sufficient to establish that their conduct in this matter had fallen short of the standard to be expected from a reasonable landowner of property adjoining a public highway. For these reasons, I would allow this appeal.

ASQUITH L.J. After much hesitation in what seems to be a difficult and delicately balanced case, I have come to the same conclusion as my Lord, for the reasons given by him, and I desire to add nothing.

SINGLETON L.J. The claim of the plaintiffs was laid in negligence, or, alternatively, in nuisance. An occupier of property owes a duty to his neighbours and to users of a highway alongside his premises. It is a duty to exercise that care which the circumstances demand; in other words, to act as a reasonably careful man would act. Professor Winfield (Law of Tort, 4th ed. p. 453) in dealing with the law of nuisance in relation to projections over the highway states the position thus: "If damage is done owing to the collapse "of the projection on the highway or by some other mischief "traceable to it, the occupier of the premises on which it "stood is liable if he knew of the defect or ought, on investigation, to have known of it. At any rate that is the rule with "respect to a thing that is naturally on the premises, e.g., a "tree." He cites the case of *Noble* v. *Harrison* (1) in which it was pointed out that a tree was not in itself a dangerous thing; and that to grow trees was one of the natural uses of the soil. Neither the defendant in that case, nor his servants, knew that the bough which fell was dangerous: indeed the fracture was due to a latent defect not discoverable by any reasonably careful inspection. It was held that a claim based on negligence failed, as also did a claim based on nuisance.

A tree may become dangerous, as was the case in *Brown* v. *Harrison and Another* (2). The tree in that case, which hung over the road, was in a state of decay and that could be seen by anyone. The Court of Appeal approved the statement of the law by Stable J. in these terms: "Having regard in

---

(1) [1926] 2 K. B. 332.

(2) 177 L. T. 281.

"each particular case to the circumstances of that particular "case, if there is a danger which is apparent, not only to the "expert but to the ordinary layman, which the ordinary "layman can see with his own eyes, if he chooses to use them, "and he fails to do so, with the result that injury is inflicted, "as in this case, upon somebody passing along the high road, "the owner is in those circumstances responsible, because in "the management of his property he has not acted as a normal "reasonable landowner would act. That, as I understand it, "is the extent of the duty." Somervell L.J. added "The "danger, therefore, must be apparent to the ordinary "layman." There may, of course, be cases in which the circumstances are such that the ordinary layman ought to foresee danger or risk and to take the precaution of calling in expert advice.

In the case now under appeal the elm which fell was about one hundred and thirty years old. The character of the neighbourhood had altered considerably during its lifetime. The tree was at a corner of the defendants' property and was twelve feet from one road and six feet from the other road. It showed no sign of disease outwardly, but it had in fact a disease of the roots (elm butt rot) of long standing, a disease which follows an injury or wound though there was no sign of any injury on the tree itself and the Lord Chief Justice accepted the evidence of Mr. Le Sueur that there was no indication that the roots had been cut at any time. Mr. Chipping, who was called in on March 1, 1947, to advise the defendants as to tidying up the garden in which the tree stood, noticed nothing abnormal about the tree, "nothing that would denote that it "was rotten in any way." He advised lopping this and other trees as part of the general tidying-up process, and he would have left about twenty-five feet of the tree standing, which meant taking off about fifteen feet. He said there was nothing whatever to make him suspicious about the tree and that "it had not a large crown—an ordinary one." Now Mr. Chipping is a man of experience in regard to trees. He knew that elms fall more easily than other trees, probably because of their shallow rooting. He said that he had occasionally been asked to deal with elms because of risk to adjoining property. Mr. Chipping began the lopping of the trees on the defendants' property the week before Easter, and all had been done except two when the accident happened on Easter Monday. This elm would have been dealt with on the

Tuesday had it not fallen. Mr. Chipping was leaving it until the last, not anticipating any danger whatsoever.

The property was managed by Messrs. Hillier, Parker, May & Rowden, surveyors and property agents of great experience. Mr. Metcalf of that firm had been in charge: the building contractors who had been engaged almost continuously since the property was de-requisitioned were nearing the end of their work, and Mr. Metcalf came to the conclusion that the garden should be put in order. That involved something being done to the trees, not from the point of view of safety but to let more light and sun into the garden. He was asked: "As an "ordinary layman, indeed, not as an ordinary layman, as "managing agent, had you observed anything which called "your attention to this tree?" and he answered: "I had "no reason to suppose that it required any special attention." Mr. Gabell, maintenance surveyor with the same firm, was called and gave the reason for the calling in of Mr. Chipping, which had nothing to do with safety. It may well be asked: "What more can be expected of those who are occupiers of "property?" They had most experienced managing agents to look after the property; the agents called in Mr. Chipping, who had been engaged in timber felling, etc., since 1915. The agents are accustomed to managing property: they saw no danger, nor did the man they called in—and one whose daily work is the felling of trees is probably as good a judge of the age of a tree and of the risks arising from falling trees as anyone.

Mr. Atkins, a witness called on behalf of the plaintiffs, expressed the opinion that some of the roots of the tree had been severed at some time: the Lord Chief Justice did not accept that view. The witness further said that an elm of this age "with a large crown" and in this position, ought to have been lopped for reasons of safety. He added that elm trees, provided that they are not wounded, will go on for two, three or four hundred years or, later, up to five hundred years. He had not seen the tree, but went to the site on January 2, 1948. Mr. Dunk, the garden superintendent of the St. Marylebone Borough Council, was another witness called on behalf of the plaintiffs. He also expressed the opinion that the roots of the tree had been cut many years previously. In cross-examination he was asked: "In the course of your inspection "and walking round, supposing you came across a tree which "you regard as a potential danger to the public in any way, "do you as a fact report it?" He answered: "I do."

" (Q.) Have you ever had any occasion to make any adverse " report on this tree ?—(A.) No." Mr. Dunk has held his position for twenty years. The tree was in his area, he saw it from time to time and during the period when the property was under requisition by the Air Ministry he had asked for some of the low branches overhanging the road to be cut back, but he had made no other suggestion. The witness was recalled at a later stage and he said that the tree had a crown of about thirty-five feet and added " I should certainly say it was a " large crown." This was the nearest approach to evidence that the crown of the tree was unusual in any sense, and it must be taken in conjunction with the fact that the witness had not thought there was anything which called for a report. There was a considerable volume of evidence to the effect that there was nothing unusual about the tree.

The defendants called as an expert witness Mr. Le Sueur, a consultant forester, who examined the remains of the tree and who said he would not call it old for an elm but " more " or less well into middle age." He described the disease from which it suffered and which had taken an abnormal course, and he said he thought it was most unlikely that the disease would have been found even by boring. Mr. Le Sueur gave certain answers on which the plaintiffs' counsel placed great reliance. He said that elms are untrustworthy and " you have more accidents with elms " and " they are more " dangerous than any other species." He was asked : " In " the case of an elm one hundred and thirty years old, if it " had a crown spreading, say, thirty-five feet to forty feet, " standing close to the highway, it might well be advisable to " have it inspected with a view to lopping ? " and he answered : " I absolutely agree." The Lord Chief Justice asked : " What did you agree to ? " and the reply was : " That " it should be inspected with a view to action being taken, or " necessary action." He gave his opinion on lopping and he was asked : " It certainly ought to be inspected with a view to " lopping before it is one hundred years old ? " and he answered : " I quite agree." " (Q.) And if you inherit it . . . . " when it is one hundred and twenty years old and it has not " been lopped at all common sense decrees that it should be " inspected for that purpose ? (A.) I could not argue against " that." He was asked by the Lord Chief Justice : " Do you " think you might have said if you went by 'Why on earth " 'don't they have it lopped ?' " and he answered " Yes, " I think so." The Lord Chief Justice attached great

C. A.
1949
Caminer and Wife
v.
Northern and London Investment Trust, Ld.
Singleton L.J.

importance to the evidence of Mr. Le Sueur, and it would seem that his judgment in favour of the plaintiffs is based very largely on some of the answers given by that gentleman. It is to be remembered that Mr. Le Sueur was an expert witness and was speaking as one having great knowledge of trees: in this respect he is not in the same category as the ordinary layman or as the reasonably careful occupier. Moreover, he was speaking after the event: he never saw the tree alive.

The Lord Chief Justice formed the opinion that the defendants did not realize their duty. Yet they had Messrs. Hillier, Parker & Co. looking after the property for them, and one may think that property agents are not slow in calling in other expert advisers if they think it desirable to do so. Indeed they did call in Mr. Chipping—not to advise on safety but as part of the tidying up scheme. Mr. Chipping saw no danger; if he had done he would not have left this tree until the last: if he had been consulted as to possible danger it would not appear as though there would have been any change in his methods. In other words, that which happened was in no way due to any failure of the defendants to realize their duty. It was just sheer bad luck that this elm was caught by a gust of wind on Easter Monday. It would have been lopped (or topped) three days earlier except that it was Good Friday, and, in the ordinary course, it would have been dealt with on the Tuesday.

The evidence, taken as a whole, does not satisfy me that the defendants have failed in their duty or that they were negligent. It is not a case of the credibility of a witness or of witnesses. I find myself unable to agree with the conclusion at which the Lord Chief Justice arrived. If there had been evidence of apparent disease, or that the tree was unduly old, or that it had an unusually large top, the case would have been different. In the absence of any such evidence it seems to me that the judgment places an undue burden on the occupiers of property and goes far towards laying down the standard of the expert rather than of the reasonably careful man who has elms in his garden or on his farm. I agree that the appeal should succeed.

Appeal allowed.
Leave to appeal further.

Solicitors for defendants: *Barlow, Lyde & Gilbert.*
Solicitors for plaintiffs: *G. Howard & Co.*

A. W. G.

Applied. *Re* 38, 39 AND 40 WINDMILL ST. [1950] 1 Ch. 308

Distinguished. WILLIAMS *v.* PORTMAN. [1951] 2 All E.R. 539.

Considered. WILLIAMS *v.* PORTMAN (VISCOUNT) [1951] 2 K. B. 948

LAWRENCE *v.* SINCLAIR.

C. A.

1949

Jan. 27, 28.

Bucknill and Asquith L.JJ. and Hodson J.

Landlord and tenant—Tenant holds over after expiration of twenty-one years' lease for two years—Tenancy then terminated by notice to quit—No claim for compensation " not less than twelve months " before " termination of twenty-one years' lease—Claim for compensation within one month after service of notice to quit—" Period " of not less than five years "—Need not be under one and the same title—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-s.* 1.

On May 5, 1936, the tenant of premises, with the landlord's consent, assigned to the claimant a tenancy under a twenty-one years' lease expiring on June 21, 1946. At the expiration of that tenancy the claimant held over on a yearly tenancy and on March 21, 1947, his landlord served notice on him to quit the premises on June 21, 1948. On March 28, 1947, within one month of the service of the notice to quit on him, the claimant served a notice on the landlord claiming a new lease or, in the alternative, compensation for adherent goodwill under the Landlord and Tenant Act, 1927, in respect of the business of a light builders' merchant which he had carried on at the premises, from May, 1936, until June, 1948. He had served no such notice of claim on the landlord at any time during the period of the twenty-one years' lease.

Held, that the tribunal had jurisdiction to hear the claim, although the " period of not less than five years " during which the claimant had carried on the trade or business at the premises in respect of which he claimed compensation for adherent goodwill extended over both tenancies and although he had made no claim for a new lease or compensation before the expiration of the tenancy under the twenty-one years' lease. There is no requirement in s. 4, sub-s. 1, of the Act, that throughout the period of five years the claimant must have held the premises as tenant under a single tenancy or title.

APPEAL from Barnet county court.

Certain premises (a half-shop and two flats above) in Ballard Lane, North Finchley, constituted a holding within the meaning of the Landlord and Tenant Act, 1927, and on July 11, 1935, were let by an underlease to S. Cliff & Co. for a term of twenty-one years less three days, as from June 24, 1925, so that this underlease would expire on June 21, 1946. On May 5, 1936, S. Cliff & Co., with the landlord's consent, assigned the unexpired portion of the underlease to Lawrence the claimant. When the underlease expired on June 21, 1946, Lawrence held over as tenant from year to year.

C. A.

1949

LAWRENCE
v.
SINCLAIR.

The defendant Sinclair acquired the leasehold reversion in the property on November 4, 1946, and became the immediate landlord of Lawrence. On March 21, 1947, Sinclair served a notice to quit on Lawrence—the tenant—to terminate his tenancy on June 21, 1948. On March 28, 1947, Lawrence served a notice under the Landlord and Tenant Act, 1927 (1), claiming a new lease under s. 5, or

---

(1) The preamble to the Landlord and Tenant Act, 1927, is in these terms : " An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof ; and to amend the law of landlord and tenant."

Section 4, sub-s. 1 : " The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i.) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant ; and (ii.) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy, be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business, for a period of not less than five years, goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto " : Provided that . . . . (*b*) : " The tenant shall not be entitled to compensation in respect of such goodwill if within two months after the making of the claim the landlord serves on the tenant notice that he is willing and able to grant to the tenant, or obtain the grant to him of a renewal of, the tenancy of the premises at which the trade or business is carried on at such rent and for such term not exceeding fourteen years as, failing agreement, the tribunal may consider reasonable ; and if the tenant does not within one month from the service of the notice send to the landlord an acceptance in writing of the offer the tenant shall be deemed to have declined the offer." . . . . (*f*) " compensation under this section shall not be payable if the tenant has determined the tenancy or failed to exercise an option for a further term contained in the lease or in a collateral agreement, unless, in the case of an option, the terms of the option are such that the tenant could not reasonably be expected to exercise it . . . ."

Sub-section 3 : " Where an offer of the renewal of a tenancy by the landlord under this section is accepted by the tenant, the rent fixed by the tribunal shall be the rent which in the opinion of the tribunal a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises having regard to the terms of the lease, but irrespective of the value of any goodwill which may have become attached to the premises by compensation under s. 4, of that Act. The compensation claimed was in respect of the adherent goodwill of a business carried on by the tenant at the premises since May, 1936, as a light builders' merchant.

The tenant had made no claim for a new lease or compensation at any time before the expiration of the twenty-one years' underlease terminating on June 21, 1946.

Mr. Horton-Smith was appointed referee on the claim and reported on March 12, 1948, that, in his view the tribunal had no jurisdiction to entertain the claim for either a new lease or for compensation, but that, if there were jurisdiction, goodwill was attached to the premises; that the claim for a new lease was defeated by the defence under s. 5, sub-s. 3 (*b*) (i) of the Act, that the landlord required the premises for his own occupation, and that 465*l.* would be the proper compensation to the tenant.

His Honour Judge Granville Smith in a reserved judgment held that he had jurisdiction to consider the claim, refused a new lease and awarded the tenant the sum of 465*l.* The landlord appealed.

Heathcote-Williams and *Plume* for the landlords. The referee took the point that the tribunal had no jurisdiction to entertain the claim, but duly made his report. The county court judge held that he had jurisdiction and awarded compensation. It is submitted that the view taken by the referee was right. The tenancy for twenty-one years expired on June 21, 1946. That tenancy was not terminated by notice and, therefore, the claimant to secure compensation in respect of that tenancy within the terms of sub-s. 1 of s. 4 should have made his claim not less than twelve months before its termination. He did not do so, and his rights are gone in respect of the period of that tenancy. In respect of the

" reason of the tenant or his " predecessors in title having " carried on thereat a particular " trade or business."

Section 25: For the purposes of this Act, unless the context otherwise requires . . . . " The expression 'tenant' means any " person entitled in possession to " the holding under any contract " of tenancy, whether the interest " of such tenant was acquired by " original contract, assignment, " operation of law or otherwise." . . . . " The expression 'predecessor " 'in title' in relation to a tenant " or landlord means any person " through whom the tenant or " landlord has derived title, " whether by assignment, by " will, by intestacy or by opera- " tion of law."

C. A.

1949

LAWRENCE
v.
SINCLAIR.

subsequent two years' tenancy, the tenant made a claim within one month after the service of the notice on him, but the claim must fail since he has not carried on a trade or business at the premises "for a period of not less than five "years," under that tenancy. To succeed, the claimant should have given two notices. The words "tenant" and "tenancy" in sub-s. 1 of s. 4 are always used in the singular. Compensation for adherent goodwill must be claimed within the period prescribed by the statute and these periods cannot be altered by the court: *Donegal Tweed Company* v. *Stephenson* (1). The basis of compensation under this Act is not the loss suffered by the tenant, but the benefit accruing to the landlord: *Hudd* v. *Matthews* (2). Adherent goodwill belongs to the landlord and not to the tenant, though in the circumstances prescribed by the Landlord and Tenant Act, 1927, the tenant may establish a claim to compensation. This Act abrogates rights of the landlord at common law and must be construed strictly. See the judgment of Scott L.J. in *H. Morell and Sons Ld.* v. *Canter* (3) and *Clift* v. *Taylor* (4). The tenant has lost his rights to compensation in respect of the twenty-one years' lease by failing to give the prescribed notice, which is a notice of at least a year to enable the landlord to consider his position. The tenant cannot by means of a short two years' subsequent tenancy deprive the landlord of the position he has gained by the tenant failing to give that prescribed notice. The tenant cannot better his position in this way. Once the twenty-one years' lease ended without the prescribed claim having been made, the tenant could not claim compensation for adherent goodwill in respect of any part of that period [*Findlay* v. *Munro* (5) was referred to].

J. W. Russell for the tenant. The contention for the landlord requires that there should be inserted into s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, after the words "for "a period of not less than five years" the words "under one "and the same tenancy or title." But these words are not to be found in the sub-section, and there is no reason why they should be implied. The language used does not admit of the meaning contended for by the landlord. See Maxwell on the Interpretation of Statutes (9th ed.) at p. 3. The object of the Act

(1) (1929) 98 L. J. (K. B.) 657.
(2) [1930] 2 K. B. 197.
(3) (1947) 63 T. L. R. 556, 557–8.
(4) [1948] 2 K. B. 394.
(5) 1917 S. C. 419.

is expressed in the preamble—" to provide for the payment " of compensation for . . . . goodwill to tenants of premises " used for business purposes," is the same whether the tenant holds the premises under one title or tenancy or more in succession. The scheme of the Act was to prevent the appropriation by a landlord under his legal rights, for his own pecuniary advantage, of something which owes its origin to the exertions and skill of the tenant. Adherent goodwill was proved in this case and it is immaterial that the period of five years extended over two tenancies ; there is no reason why it should not so extend and the Act does not provide that the period must be contained in one tenancy.

By proviso (*f*) to sub-s. 1 of s. 4, compensation is not to be payable if the tenant has failed to exercise an option for a further term contained in the lease, unless the terms of the option are such that the tenant could not reasonably be expected to exercise it. He is barred from compensation if he does not exercise the option. If he does exercise it and has not given notice of claim at least twelve months before the termination of the original lease, it cannot be that he is also barred from compensation if the option for renewal is exercised and only operates for three or four years. If that is so, compensation is barred whether he does or does not exercise the option. The claim here is for a new lease under s. 5 and the grant of compensation for adherent goodwill was only made on the ground that the tribunal was precluded from granting a new lease. The word " notice " is always used in the singular in s. 4 ; the Act does not contemplate the tenant giving two notices.

Heathcote-Williams replied.

BUCKNILL L.J. The argument on behalf of the landlord is, put shortly, that the claim for compensation must be in respect of one tenancy only, and in this case the compensation is claimed partly in respect of the tenancy for twenty-one years ending on June 21, 1946, and partly in respect of the tenancy of year by year thereafter. Section 4, sub-s. 1, of the Landlord and Tenant Act, 1927, clearly lays down that in the case of a tenancy which is not terminated by notice, notice of the claim for compensation must be made not less than twelve months before the termination of the tenancy. No such notice was given in this case in respect of the tenancy which came to an end in 1946, and, therefore,

C. A.

1949

LAWRENCE
v.
SINCLAIR.

Bucknill L.J.

it is argued that the tenant has got no right to compensation under the lease which ended then, and that since he has not been a tenant for five years under the subsequent tenancy which continued from year to year, he is debarred from making a claim at all for compensation in respect of this admitted goodwill, which has been valued at 465*l*. It was contended that it is impossible for a tenant to aggregate two separate tenancies as has been done in this case, and that there was clearly a new tenancy when, the original lease having expired, the applicants held over from year to year. In other words it is said that after the words in s. 4, sub-s. 1, of the Act " for a period of not less than five years " there must be read into the sub-section the words " under one and " the same title."

Reference was made to a judgment of Scott L.J., in *Clift* v. *Taylor* (1) in which he said : " The Act "—the Landlord and Tenant Act, 1927—" interferes with freedom of contract " and thus modifies an important right of the individual. " Any real ambiguity of language in any particular provision, " still apparent even when construed in the light of the whole " Act, ought to be resolved in favour of maintaining common " law rights. For the same reason its plain meaning should " not be strained in favour of any pre-supposed intention " to enlarge the tenant's or to cut down the landlord's " contractual rights." The question here is whether there is any real ambiguity in the words of s. 4, sub-s. 1, of the Act. It is curious that although this Act was passed in 1927, this point has never been raised in any legal proceedings, so far as I know, until it was raised by the referee who himself took the point on the reference and in his report to the county court judge.

Counsel for the claimant went back to first principles when he cited Maxwell on the Interpretation of Statutes (9th ed.), at p. 3, as to how one is to read a section of this kind : " Section 2—Literal Construction : The first and most " elementary rule of construction is that it is to be assumed " that the words and phrases of technical legislation are used " in their technical meaning, if they have acquired one, and, " otherwise, in their ordinary meaning ; and, secondly, that " the phrases and sentences are to be construed according " to the rules of grammar. From these presumptions it is " not allowable to depart where the language admits of no

---

(1) [1948] 2 K. B. 394, 400.

"other meaning. Nor should there be any departure from "them where the language under consideration is susceptible "of another meaning, unless adequate grounds are found, "either in the history or cause of the enactment or in the "context or in the consequences which would result from the "literal interpretation, for concluding that that interpretation "does not give the real intention of the legislature." Then the judgment of Lord Warrington in *Barrell* v. *Fordree* (1) is given: "The safer and more correct course of dealing "with a question of construction is to take the words them- "selves and arrive, if possible, at their meaning without, "in the first place, reference to cases." There are no cases, as I have said, which deal with this point which has now been raised. We must therefore, examine the words of the sub-section themselves.

First, is this a case where a tenancy has been terminated by notice? There is no doubt that it is: proper notice has been given. Was the claim for a new lease and compensation made within one month after the service of the notice? It was. Has the claimant quitted the holding? He has. Then has the claimant proved "to the satisfaction of the tribunal that "by reason of the carrying on by him or his predecessors "in title at the premises of a trade or business for a period "of not less than five years, goodwill has become attached "to the premises by reason whereof the premises could be "let at a higher rent than they would have realized had no "such goodwill attached thereto?" He has proved that. Why then should he not get compensation? The only reason put forward is that one must read into this section words which are not there, namely, that he must have carried on the business for the period of five years under one and the same title be it lease or other tenancy and that he cannot add together, for example, two separate three-year tenancies following the one after the other. I think that to read such words into the sub-section would be wrong according to the principles of construction to which I have referred, and that to do so would defeat the object of the Act set out in the preamble.

So far as one can get any assistance from other sections or sub-sections in the Act, I think that proviso (*f*) to sub-s. 1 of s. 4 helps the tenant in this matter. By that proviso: "Compensation under this section shall not be

---

(1) [1932] A. C. 676, at p. 682.

C. A.

1949

LAWRENCE
v.
SINCLAIR.

Bucknill L.J.

" payable if the tenant has determined the tenancy or failed " to exercise an option for a further term contained in the lease " or in a collateral agreement, unless, in the case of an option, " the terms of the option are such that the tenant could not " reasonably be expected to exercise it." It seems to me that a tenant who exercises an option for a further term, contained in a lease is very much in the same position as a tenant under a new tenancy. This provision seems to indicate that a tenant, having exercised such an option, would be entitled to claim compensation in respect of his tenancy under that option. The option might be for a period of perhaps three years. What is the position of such a tenant ? If he has, for instance, been in occupation of the premises for two years under the original lease and then continues under the option for another three years, if the learned judge is right, he would be entitled to claim compensation because he had been in occupation for a period of five years within the meaning of the sub-section. But if the contention for the landlord is right, it would seem that unless the tenant, at least a year before the original lease expired, had given notice that he was going to claim compensation, he would be debarred from claiming compensation in respect of the original lease and also in respect of the lease under the option since it had not continued for five years and he could not claim for the total period of five years. It seems to me that Parliament cannot have intended to place the tenant in so unreasonable a position. By proviso (*f*) he is informed that he cannot claim compensation unless he exercises the option. He does not make a claim a year or more before the original lease has expired but exercises the option. Then if the renewal under the option expires before the expiration of five years, he finds that he cannot claim compensation. For those reasons, in my view, this appeal should be dismissed.

ASQUITH L.J. I agree. The question is whether the tenant has fulfilled the conditions precedent to the right to compensation contained in s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927. The terms of that section are, in my view, quite unambiguous, and there is nothing to qualify their plain, grammatical meaning.

To entitle himself to compensation under the section, an applicant must show, first, that he was the tenant of a holding within the definition of the Act. It is conceded that he has shown that. He must show, secondly, that he has given notice of his claim in the prescribed manner, which (when, as in this case, his own lease was determined by notice to quit) is by giving notice to the landlord within a month after receiving that notice to quit. This also he has done. Then he must show to the satisfaction of the tribunal, (*a*) that he or his predecessors in title have carried on at the premises a trade or business for a period of not less than five years; (*b*) that goodwill has in consequence attached to the premises; and (*c*) that by reason thereof the premises could be let at a higher rent than they would have realized otherwise.

In this case the second and third of these requirements ((*b*) and (*c*)) are not in dispute, provided the first is satisfied. The landlord maintains that the first condition is not satisfied, and he so maintains on the ground that the five years referred to must be five years during which the tenant is holding under a single tenancy or title. The five years, he says, must not be spread over two tenancies, even if they are immediately consecutive the one upon the other. It was conceded at once that the five years have to be continuous, as clearly implied in the expression in the sub-section "period of not less than five years." But there seems to be no warrant for the qualification which Mr. Heathcote-Williams, in his lucid and ingenious argument, attempted to embroider upon the simple terms of the sub-section. The section nowhere states that the period of five years must be under a single tenancy, and there seems to be no room and no need for any such implication. Incidentally, the evil struck at by the Act, which is the appropriation by the landlord of the fruits of the tenant's industry and labour, would be just the same in quantity and quality whether the five years is spread over one tenancy, two tenancies, or a dozen tenancies.

However, this consideration is not needed in interpreting the terms of a sub-section which is perfectly plain and unambiguous. It is said by Mr. Heathcote-Williams that this construction of the section should be avoided because it places the tenant in as strong a position, as if he had done what he, in fact, omitted to do, that is, as if he had given notice of his claim twelve months before the twenty-one years' lease expired, and that his failure to give notice at that time precludes him, for good, from claiming in respect of any goodwill acquired during the period of that earlier lease. It is true that if, on termination of the twenty-one years' lease, he had quitted the holding instead of getting a renewal of the tenancy, he could not have made a claim because he would not have been within the express terms of the opening words of sub-s. 1 of s. 4: "The tenant of a holding . . . . if a claim "for the purpose is made in the prescribed manner," which, in the events assumed, would be a claim made twelve months at least before the termination of that twenty-one years' lease. Therefore, in that event, it is quite true that he could not have made a claim; but, owing to the holding over, he became a tenant, who having received notice to quit, had to give, and has given, notice of his claim within one month of the service of the notice to quit. Accordingly a claim for the purpose has been made within the meaning of the opening words of the sub-section. The effect is to entitle him to compensation if he can further show that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years, goodwill has become attached to the premises within the meaning of the sub-section. This he has, in my view, shown. If it is said that this puts him in as strong a position, as if he had given notice of a claim twelve months before the twenty-one years' lease expired, I can only say that in my view the plain, unambiguous language of the section leads to that result, and, if the legislature wished to avoid that result, it should have used different language.

Two other points were made with which I will deal shortly. Mr. Heathcote-Williams laid some stress on the fact that the word "tenancy" in sub-s. 1 of s. 4 is in the singular number, but I do not think that that fact helps him, because the tenancy with which the sub-section is dealing is the tenancy upon whose termination the claimant quits and there was only one such tenancy. I have nothing to add to what my Lord has said as to the effect of proviso (*f*) of sub-s. 1 of s. 4. I agree that the appeal should be dismissed.

HODSON J. I agree. The application before the court was made under s. 5 of the Landlord and Tenant Act of 1927, but the tenant had to qualify within s. 4. The argument for the landlord was that the tenant had not qualified within s. 4 because he had irrevocably lost the rights which he had under the lease which expired on June 21, 1946, not having made his claim in time, because part of the five years must necessarily have passed during the currency of that lease. The proposition which Mr. Heathcote-Williams put, as I understand it, is stated shortly in Foa's General Law of Landlord and Tenant (7th ed.) at p. 756 : " Compensation for " goodwill is not payable unless the tenant has made a claim " within the time prescribed." He relied upon *Donegal Tweed Co.* v. *Stephenson* (1), for the proposition that the time cannot be altered by the court, and it was said that no application could now be made in due time under the long lease, and that the tenant had lost his right forever in respect of the period of that lease and it could not be resuscitated.

That argument has certain attractions, but I agree that, faced with the plain language of the statute, the tenancy which has to be considered is the tenancy which exists at the quitting of the holding. Although the tenant's claim for compensation under the original lease was barred, that bar only applied if he quitted the holding at the time of the expiration of the lease. On the simple construction of sub-s. 1 of s. 4 of this Act, the tenant qualifies for compensation if he is a tenant at the time of quitting the holding, notwithstanding the fact that that tenancy has not subsisted during the whole five years. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the landlord : *E. E. Pugh & Co.*
Solicitors for the tenant : *Jones (Merton), Lewsey & Jefferies.*

(1) 98 L. J. (K. B.) 657.

C. G. M.

NORTON AND ANOTHER *v.* WHITE.

C. A.
1949
Apr. 4, 5.
Tucker and Singleton L.JJ.

Landlord and tenant—Rent restriction—Standard rent—Premises prior to 1930 *let at* 14*s. per week—Premises owner-occupied from* 1930 *to* 1936*—Premises let from November* 30, 1936, *at* 35*s. per week—Registration—Whether premises again brought under control by*

C. A.

1949

NORTON
v.
WHITE.

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1 & 2 *Geo.* 6, *c.* 26), *ss,* 2, 4.

Premises which prior to 1930 had been let as a separate dwelling-house at a rent of 14*s.* per week, then came into owner-occupation. In 1936 they were let to the present tenant at a rent of 35*s.* per week. In October, 1948, on the application of the present tenant, the county court judge fixed the standard rent at 14s. per week, on the ground that the premises having been taken out of control under the Rent and Mortgage Interest Restrictions Act, 1920, by s. 2 of the Act of 1923, when they came into owner-occupation in 1930, and the landlord having failed to register that exclusion from control, under s. 4 of the Act of 1938, the premises were brought back into control by the Act of 1938.

Held, that the premises, being in owner-occupation on July 17, 1933, the day before the passing of the Act of 1933, were not, nor ever would have been, within the principal Acts. The landlord could therefore establish the exclusion of the premises from control without reference to s. 2 of the Act of 1923, and registration under s. 4 of the Act of 1938 was unnecessary to preserve that exclusion. The appeal must therefore succeed and a declaration be made, fixing the standard rent at 35*s.* per week.

APPEAL from Edmonton county court.

Prior to 1930 the premises, No. 72, Gladesmore Road, Tottenham, were let at a rent of 14*s.* 0*d.* per week. From 1930 till 1936 they were owner-occupied. On November 30, 1936, by an agreement of that date, the house was let to the present tenant at a rent of 35*s.* 0*d.* per week (91*l.* per annum) by the present landlord's predecessor in title. In August, 1939, the present landlord became the owner. From November 30, 1936, until these proceedings, the tenant duly paid the agreed rent of 35*s.* 0*d.* per week. On October 25, 1948, after an interval of nearly twelve years, the tenant applied to the registrar of the Edmonton county court to fix the standard rent of the premises. The registrar fixed the standard rent at 14*s.* 0*d.* per week, the figure at which the premises were first let after August, 1914, and His Honour Judge Done affirmed his decision. The landlord appealed.

Scott Henderson K.C. and *L. S. Fletcher* for the landlord. On July 17, 1933, immediately before the passing of the Rent Restriction Act of that year, these premises were not let as a separate dwelling house, being in the occupation of the owner. Therefore apart altogether from the provisions of the Act of 1923 (1) the principal Act of 1920 did not apply. The landlord can therefore establish the exclusion of the premises from control without reference to the Act of 1923, and registration under s. 4 of the Act of 1938 was not necessary to preserve that exclusion. The standard rent is therefore 35*s*. 0*d*. per week.

J. F. Donaldson for the tenant. These premises having been let as a separate dwelling-house until 1930, were then taken out of control under the principal Acts, on their becoming owner-occupied, by s. 2 of the Act of 1923. The owner not having registered the premises under s. 4 of the Act of 1938, the exclusion from control is not preserved, and the decision of the learned judge was correct.

TUCKER L.J. stated the facts and continued: No question of rateable value arises in these proceedings at all. It is conceded, subject to the point to which I now pass, that so far as rateable value is concerned, the premises would be within the Act of 1938. If they are within the Act of 1938, and controlled thereby, then the standard rent is 14*s.* 0*d.* per week, as fixed by the learned judge. On the other hand, if they are not within that Act, but if they are only caught by the Act of 1939, then the standard rent is 35*s.* 0*d.* per week, which was the sum agreed on November 30, 1936.

---

(1) Rent and Mortgage Interest (Restrictions) Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 1, sub-s. 2: "As from the 29th day of September, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed . . ."

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 2, sub-s. 1: "Subject to the provisions of this Act relating to registration, the principal Acts as from the 29th day of September, 1938, shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act . . . ."

Section 4, sub-s. 1: "If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in s. 2 of this Act, claims that by virtue of the provisions of s. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the Council of the county borough or county district . . . . application in the prescribed form for the registration of the dwelling-house."

In my view, the point on which this decision depends is whether the principal Acts would have applied to this dwelling-house on July 17, 1933, but for the Act of 1923. Before dealing with that, it is necessary to refer to the relevant sections in the Acts. I have already said that it is conceded that up till the year 1930 the house was within the Act of 1920; it came within the definition of s. 12, sub-s. 2, of that Act, which is as follows: "This Act shall apply to a house "or part of a house let as a separate dwelling, where either "the annual amount of the standard rent or the rateable "value does not exceed"—certain named amounts—"and "every such house or part of a house shall be deemed to be a "dwelling-house to which this Act applies." Accordingly, it was within the Act of 1920. Then came the Act of 1923, which, so far as is material, by s. 2, sub-s. 1, provides: That where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing, or comes into possession of the whole of the dwelling-house at any time after the passing, of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. In the present case, the landlord did come into possession after the passing of this Act, namely, on some date in the year 1930, and, accordingly, as from that date, the principal Act ceased to apply to the dwelling-house.

Thereafter, there was passed the Act of 1933, which by s. 1, sub-s. 2, provided that as from September 29, 1933, the principal Acts should not apply to any dwelling house unless it was a dwelling-house to which they applied immediately before the passing of that Act. The question is whether it was a house to which the principal Acts applied immediately before the passing of the Act of 1933, that is to say, was it a dwelling-house to which the principal Acts applied on July 17, 1933? In one sense, it quite clearly was not, because it had been taken out of the principal Acts by the provision in the Act of 1923, but it is said that it would have been outside the purview of the principal Act in any event, apart altogether from the provision of the latter Act, and that it is not necessary for the landlord to rely on the Act at all. The Act of 1933 contains a definition of "dwelling-house" in s. 16, sub-s. 1: "'Dwelling-house' has the same meaning "as in the principal Acts, that is to say, a house let as a separate "dwelling or part of a house being a part so let." [His Lordship then read s. 2, sub-s. 1, of the Act of 1938 and continued:] So, subject to the provision relating to registration, a dwelling-house is outside the Acts if it is a dwelling-house to which the Acts did not apply immediately before the passing of this Act. It is, therefore, necessary to see—I shall deal with the provisions as to registration in a moment—whether or not this was a dwelling-house to which the principal Acts applied immediately before the passing of the Act of 1933 and, in order to do so, we are thrown back upon s. 1, sub-s. 2, of that Act. As I have already stated, the premises in question were not let on July 17, 1933, but they were let in the year 1936. It is said on behalf of the landlord that when one looks at the Act of 1933, and when one considers what was the position of these premises on July 17 of that year, the day before that Act came into force—that the landlord was then in occupation of the premises—the principal Acts did not apply to them on that day, irrespective altogether of the provisions of the Act of 1923.

I now pass to the provisions with regard to registration in the Act of 1938, because the whole of s. 2 of that Act is subject to the provisions dealing with registration. [His Lordship read s. 4, sub-s. 1, and proceeded:] So the Act is providing that where a landlord is claiming to be excluded by the Act of 1923 in order to preserve his exclusion he must register. Sub-section 2 of the same section provides: "If, in "any proceedings with respect to any dwelling-house which "is, or immediately before the passing of this Act formed "part of, a dwelling-house to which sub-s. 1 of this section "applies, it appears that but for the provisions of the said "s. 2 of the Act of 1923 the principal Acts would have applied "to the dwelling-house and that no application has been "made by or on behalf of the landlord under that sub-section "within the time therein mentioned, the dwelling-house shall, "subject as hereinafter provided, be deemed to be a dwelling-"house to which the principal Acts apply."

The result of that is—as I have stated earlier—that ultimately the question which falls to be decided, in my view, is whether or not on July 17, 1933, the principal Acts applied to this dwelling-house, or whether they did not, apart from the provision of the Act of 1923. In his admirable argument presented to us on behalf of the tenant, Mr. Donaldson said this: these premises were taken out by the Act of 1923. He also said that the landlord cannot escape from that, whether he likes it or not, and, when he is claiming in any proceedings that he is outside the scope of the Acts after the coming into force of the Act of 1938, if he shows as part of his case—as he must do—that it has been taken out of the Acts by the Act of 1923, then, if he has not registered, his exclusion is not preserved. Furthermore, Mr. Donaldson says, apart from the provisions of the Act of 1923, that on July 17, 1933, this dwelling-house would have been a dwelling-house to which the principal Acts applied, notwithstanding the fact that it was not at that date let as a separate dwelling. Mr. Donaldson also says that that is because it was a house within the limits of rateable value prescribed by the Acts, and it was a house which had at one time been let, and, therefore, having once been let, it was always a house within the principal Acts even if it was not let on July 17, 1933. Since the principal Acts applied to it—that it always had a standard rent and so forth—the argument on behalf of the landlord is that by reason of the definition of "dwelling-house," whether you take the definition in the Act of 1933 or the definition in the Act of 1920, in order that a house shall become a dwelling-house to which the Act applies it must be a house which at the material date was let as a separate dwelling, "and," says the landlord, "on July 17, 1933, this house was not a house let as a separate "dwelling; it was not let at all because I was in it." Therefore he says: "Apart altogether from the provisions "of the Act of 1923, the principal Acts did not apply and would "not have applied in any event," and therefore, he says: "I am not claiming under s. 4 of the Act of 1938 that, by virtue "of the provisions of s. 2 of the Act of 1923, the principal "Acts have ceased to apply to this dwelling-house; I am "not claiming any such thing, I am saying that apart altogether "from the Act of 1923 this house was not within the principal "Acts at the material date."

After setting out the arguments and referring to the sections, the learned county court judge said: "In my view the "application of s. 4 to the house is quite clear, it was "decontrolled by the Act of 1923 and, but for that Act, the "principal Acts would have applied." I confess that whatever the proper answer may be to the problems which arise in the present case, I do not find them clear. I have come to the conclusion that the interpretation put upon these sections by the landlord is the correct one, and I have arrived at a different conclusion from that reached by the learned registrar and the learned county court judge. It seems to me that the point that the principal Acts had no application to this house on July 17, 1933, is a good one. In my view, for a house to be within the protection of the Acts, or rather for the Acts to apply to that house—for that is the language of the Acts—at any particular moment of time with which the court is concerned (and in this case the court is concerned with July 17, 1933), it is essential that it should, at that moment of time, be a dwelling-house let as a separate dwelling. In that connexion I should like to refer to what was said by Slesser L.J. in *Schaffer* v. *Ross* (1). The question had arisen previously as to the effect of the definition of "dwelling-"house" in s. 16 of the Act of 1933, having regard to the definition in the Act of 1920. I have read those definitions, and I will not repeat them, but they are not in quite the same language. Slesser L.J. said this: "A doubt was "expressed in *Brooks* v. *Brimecome* (2) about the effect of that "definition in the Act of 1933 on the earlier definition in "s. 12, sub-s. 2, of the Act of 1920, but, if the matter is now "to be considered, I am of the opinion that, having regard "to the mischief to which the Acts are directed, s. 12, sub-s. 2, "of the Act of 1920 should be read as if the word 'let' "governed the word 'house' as well as the words 'part of "'a house'." I respectfully concur with what Slesser L.J. said there, so far as it applies to the case with which we are dealing, and to the extent that it conflicts with the decision of Sargant J. in *Woodifield* v. *Bond* (3), I prefer what was said by Slesser L.J. in the case to which I have just referred. Therefore, in my view, it matters not whether it is the definition of the Act of 1933, or the definition of the Act of 1920, to which we have to look for the purpose of deciding the status of this dwelling-house on July 17, 1933. In arriving at this decision, I have derived some assistance from the case of

---

(1) [1940] 1 K. B. 418, 420.
(2) [1937] 2 K. B. 675.
(3) [1921] W. N. 309.

C. A.
1949
Norton v. White.
Tucker L.J.

R. & P. Properties v. *Baldwin* (1). It is quite true that the facts of that case are different from those of the present case, and that there are many differences between that case and this. In that case, two adjacent flats in a block of flats were controlled under the Acts and let to two separate tenants at separate rents. In June, 1935, the tenant of one of the flats left and the landlords then made certain alterations in the two flats and turned them into one, and thereafter let the one flat at an increased rent of 17*s*. 6*d*. The learned deputy county court judge held that the alterations made by the landlords were of a minor kind and did not change the identity of the flats as a separate dwelling-house, and that the combined premises continued to be subject to the Rent Acts. In giving his judgment and coming to a different conclusion from that arrived at by the learned deputy county court judge, Slesser L.J. did stress and lay emphasis on the fact that he regarded the reconstruction as having completely altered the identity of the premises, and he did not regard the alterations as minor matters. Having set out what the alterations were, Slesser L.J. said: "In my opinion it is impossible "upon that evidence, especially after the new flat rent had "been fixed at 15*s*. 0*d*. a week, following upon the assimilation "of No. 69 and No. 70 into one occupied premises, to come "to the conclusion that No. 69 or No. 70 continued as a "separate entity. To my mind it is clear that there was after "June, 1935, a new occupation of premises which as such "did not exist as premises before that time. There was "thereafter only one doorway giving access to both the "premises. A hole was made in the wall between the two "flats and a doorway made, thereby giving a passage to and "fro between the two flats, a state of affairs which did not "exist before. There were also other physical alterations "made in the two flats. The obligation of rent was an "obligation agreed on to pay 15*s*. 0*d*. a week, extending, as "Mr. Stewart said, over the new combined flat. I think, "therefore, that the deputy county court judge was wrong "in coming to the conclusion that from the point of view "of the Rent Restrictions Acts, he could still look at No. 69 "or No. 70 as separate dwelling-houses, each admittedly "controlled under the Rent Restrictions Acts before 1935," and then, having referred to the provisions of the Acts of 1938 and 1933, he says: "On the view that this flat, composed

---

(1) [1939] 1 K. B. 461, 466, 467.

"of former premises combined, was let as a separate "dwelling, it is clear that it could not have been so let "before June, 1935, because before that date it did not "exist, and therefore was not a dwelling-house within the "meaning of s. 1, sub-s. 2, of the Act of 1933 (1)." Clauson and Goddard L.JJ. attached little, if any, importance to the extent of the physical alterations in the flat. Clauson L.J. referred to them and then said: "The landlords made "alterations of a quite minor character which were necessary "to enable No. 69 and No. 70 to be occupied together as "one flat. Those alterations had, however, the very important "effect of turning what had previously been two tenements "separately occupied into one tenement capable of a single "occupation," and he then asked what in law is the effect of that, and he proceeds: "The point seems to me, when one "studies the intricacies of it, to be reasonably plain. By "reason of s. 2 of the Act of 1938, a house let as a separate "dwelling is not a house to which the Rent Restrictions "Acts apply unless it is a house which, let as a separate "dwelling, is one to which the Acts applied immediately "before the passing of the 1938 Act. It appears from s. 1, "sub-s. 2, of the Act of 1933, that no house let as a separate "dwelling before the passing of the Act of 1938 is a dwelling "to which the Rent Restrictions Acts apply unless the Acts "applied to that house let as a separate dwelling immediately "before the passing of the Act of 1933. At the time the 1933 "Act was passed the combined flat No. 69 and No. 70 was "not a house let as a separate dwelling. At that time two "separate flats No. 69 and No. 70 were separately let and "separately occupied. The combined flat made up of No. 69 "and No. 70 thrown together only came into existence as "the subject-matter of a letting, and as a house to which the "Rent Restrictions Acts might possibly apply, in 1935. In "other words, it was not a house which existed at all as a "house to which the Rent Restrictions Acts could apply "in 1933 (2)." Goddard L.J. said: "To my mind it makes "very little difference—in fact it makes no difference—whether "or not they have had at some time since 1933 or 1935 internal "connexion made between them. They are adjoining "premises. In 1935 and indeed in 1933, before September 29, "1933"—that is a slip and the learned Lord Justice should have said "before July 18, 1933"—"they were not let as

---

(1) [1939] 1 K. B. 461, 466, 467.

(2) Ibid. 468.

C. A.

1949

NORTON
v.
WHITE.

Tucker L.J.

" a separate dwelling, but they were let as two separate " dwellings." I pause there because I cannot help feeling that if the fact had been that at the material date they were not let at all, the reasoning of Goddard L.J. would have applied with still greater force, and that he would have said that in 1935, and indeed in 1933, they were not let as a separate dwelling but they were not let at all, because the landlord was in occupation. Goddard L.J. goes on: "They were " treated as two distinct hereditaments, let at two distinct " rents to two distinct persons. Therefore I cannot see how " it can be said that the premises which are comprised in the " demise to Mr. Baldwin, in respect of which this action is " brought, were at the material date to which I have referred " let as a separate dwelling. If they were let as two dwellings, " it follows that they were not let as a separate dwelling." [I would substitute for that: " If they were not let at all but were in the occupation of the landlord, it follows that they were not let as a separate dwelling."] " It may be that " what had previously been two flats were made into one " flat. That is another matter. The person who lives in " the flat which previously, before being reconstructed, was " two flats, does not say that he lives in two flats, but that " he lives in one flat. The fact is that these premises were " never let as a separate dwelling until 1935. As they were " not let as a separate dwelling in 1933, the Rent Restrictions " Acts do not apply (1)."

Mr. Donaldson says that one material distinction to be made in regard to that case is this: that, although it might be true to say that if these premises had never at any time been let and had been owner-occupied on July 17, 1933, they would have been outside the Acts, it is different if at some previous date they had once been let. The difficulty I find about that is that although it might be quite a possible view of the matter for the legislature to have taken, I cannot anywhere find in the Acts any such provisions, nor can I find any authority to that effect. It seems to me, although I agree that the facts are very different, that the reasoning—at any rate, of Clauson and Goddard L.JJ.—in the judgments which I have just read apply to the present case. On July 17, 1933, the landlord being in occupation, these premises could not be said to have been let as a separate dwelling. Not being let as a separate dwelling at the material date, they were

(1) [1939] 1 K. B. 461, 469.

not within, nor ever would have been within, the principal Act. I think the landlord can establish the exclusion of these premises without reference to the Act of 1923 at all, and effect can be given to the provisions of s. 4 of the Act of 1938, which requires registration in certain circumstances by the landlord, because they are clearly necessary and would be required in a case where the premises had been taken out of the Acts by the Act of 1923, but were let on July 17, 1933. In that case, the only way in which the landlord could preserve the exclusion which the premises had acquired under the Act of 1933 would be by registering under the provisions of s. 4 of the Act of 1938. Thus one can see the necessity for the provisions of s. 4. In my view, in the present case there was no need for the landlord to preserve the exclusion which existed—irrespective altogether of the Act of 1923—and which attached, if I can use the expression, to these premises on July 17, 1933.

For these reasons, I think that in this very complicated and difficult case the argument of the landlord prevails. It is very regrettable that in a matter of this kind, which closely affects the lives of people of small means, it should not be possible for them to ascertain what their rights are without prolonged and complicated proceedings of this kind; but that is a matter with which we have been concerned for a long time now. In my view, the appeal succeeds and there will be a declaration that the standard rent is 35*s.* 0*d.*

SINGLETON L.J. I agree.

Appeal allowed.

Solicitor for landlord: *Leslie A. Fawke.*
Solicitors for tenant: *Windsor & Co.*

A. W. G.

BAREFOOT *v.* CLARK

C. A.
1949
Apr. 12.
Somervell and Evershed L.JJ. and Wynn-Parry J.

Judgment debt—Judgment summons—Order for committal unless debt paid by instalments—Departure from usual practice—Absence of evidence of means—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

On October 24, 1948, an order was made in county court proceedings for trespass for payment of damages and costs amounting to 31*l.* 0*s.* 4*d.* The defendant, having failed to pay, a judgment summons was taken out by the plaintiffs and on

December 16, 1948, the judge made an order committing the defendant to prison for fourteen days, the order not to take effect if payment was made in instalments of 2*l.* every twenty-eight days. At the hearing the defendant who was a married woman, said she had no means to pay the debt but the judge declined to believe her and assumed that normally she would be given something by her husband to spend on herself apart from money for necessaries and that this justified his making the order :—

Held, that an appeal from the order must be allowed on the grounds (1.) that in making a committal order on the first application the judge had departed from the recognized practice of first making an order for payment in instalments ; and (2.) that there was no evidence that the defendant had means to pay the judgment debt. Even on the judge's assumption he would only expect her to receive about 2*l.* a month, a sum which in the two months between the original order and the committal order was completely insufficient to pay the debts.

In re a Judgment Debtor (1935) 51 T. L. R. 452 approved and applied.

APPEAL from Reading county court.

The plaintiffs Isabel Barefoot and Doris C. Whitehorn resided at 23 School Road, Tilehurst, Reading, and the defendant Mrs. Clark, lived with her husband at No. 19 in the same road. As the result of a dispute the defendant went into the plaintiffs' garden and released two budgerigars, causing their loss. The plaintiffs brought proceedings in the county court for trespass, claiming damages, and on October 20, 1948, the county court judge gave judgment for damages and costs amounting together to 31*l.* 0*s.* 4*d.* The defendant having failed to pay the judgment debt, the plaintiffs issued a judgment summons against her and on December 16, 1948, the county court judge made an order for commitment of the defendant to prison for 14 days the order not to be put into force if the sum of 32*l.* 1*s.* 4*d.* (being the judgment debt and the cost of the summons) should be paid into court by instalments of 2*l.* every 28 days, the first instalment to be paid on January 16, 1949. The defendant appealed.

The only evidence of what happened at the hearing was contained in an affidavit of the plaintiffs' solicitor dated March 29, 1949. It stated that the defendant appeared in person and in reply to questions by the county court judge said she had no offer to make as she had no means, that her husband did not allow her anything for housekeeping as he paid everything himself and that when she asked him for money he gave her 2*s.* 6*d.* or sometimes 4*s.* or 5*s.* On being asked in cross-examination whether she had asked her husband for money to pay the debt, she relied that he was not interested as he had offered to pay 5*l.* at an early stage and his offer being refused, he would pay no more.

The county court judge's statement as to the hearing of the judgment summons was: I took no notes on the hearing of "the summons and I gave no reasons at the time of making "the order. I was satisfied that . . . . the defendant had "deliberately not told the truth when giving evidence on the "hearing of the judgment summons when the debtor stated "that she had no means and that her husband was not "interested. I thought from her demeanor that she did not "intend to pay the debt and I was not prepared to accept "what she said. I assumed that normally she would be "given something by her husband to spend on herself apart "from money for necessaries and I therefore thought it right "in all the circumstances to make an order against her."

W. E. B. Behrens for the defendant: There was no evidence justifying the county court judge's order for commitment under the Debtors Act, 1869, s. 5. It has frequently been said that the onus is on a plaintiff asking for a committal order to prove the defendant's ability to pay and even if the county court judge disbelieved the defendant in this case, there was no evidence of any kind before him proving means. In an action for tort the husband's position is irrelevant as he is not liable for his wife's tort. Further the procedure adopted here is contrary to the practice as laid down by Luxmoore J. in *In re a Judgment Debtor* (1) in construing s. 5 of the Debtors Act, 1869. He ought at the most to have made an order for payment in instalments and when the instalment order was not complied with make an order for commitment.

Morris Finer for the plaintiffs: It is admitted that under the Debtors Act, 1869, s. 5, the judge has to be satisfied that the defendant is able to pay the judgment debt. The court ought not to assume against the county court judge that this consideration was not present to his mind. The fact that the order was made in spite of the nature of the evidence goes to show that he regarded this as an exceptional case. When the judge has said that he does not believe the defendant this court will be loath to interfere. The defendant at least had money to appear before this court and for that purpose to employ solicitor and counsel. Should she not have used that money to pay the debt? She is not appearing here as a poor person. It is, admittedly, most unusual for a judge to make a committal order on the first application, but I rely on that to show how strongly the judge felt. He was convinced that the defendant could pay something if she wanted to and after all the order for commitment was not to apply if she paid 2*l*. a month. He asked the court to have regard to the practical effect of the order.

---

(1) (1935) 51 T. L. R. 524.

W. E. B. Behrens replied.

SOMERVELL L.J. This is an appeal from a committal order made on a judgment summons by Judge Donald Hurst, whereby it was ordered that the defendant should be committed to prison for 14 days, but that the order should not be put into force if the sum of 32*l*. 1*s*. 4*d*. were paid into court by instalments of 2*l*. every 28 days, the first of such payments to be made on January 16, 1949.

This is the type of matter in which this court would not interfere with the county court judge, as it seems to me, unless satisfied that he had not applied the right principle of law. I would also like to say that in a matter of this kind I would always assume in a learned county court judge's favour that he was entitled to have regard, and was having proper regard, to what had happened at the trial and to what he had got to know of the parties, and that it would be unnecessary for him to set out in full and in detail every fact which he took into account in coming to the conclusion that he was satisfied, as he has to be under s. 5 of the Debtors Act, 1869. The leading case on the construction of that section is contained in *In re a Judgment Debtor* (1) in which a judgment was delivered by Luxmoore J. that has always, I think, been accepted as stating the principles which all courts should apply when applying that section. The first point made in that judgment is that it is unusual to make a committal order on the first judgment summons, except at any rate, in respect of defaults on an instalment order. The learned judge says: "It is the fact, however, that (as Lord Esher, stated in *Reg.* v. *Judge* "*of Brompton County Court* (2), the section does not enable "the judgment creditor to ask merely for an instalment order. "Before the judge can make an instalment order he must "have before him an application for committal. It is accord-

(1) 51 T. L. R. 524.

(2) (1886) 18 Q. B. D. 213, 217.

C. A.

1949

BAREFOOT *v.* CLARK.

Somervell L.J.

"ingly the practice of the court always to require evidence of "means to be filed on a judgment summons, and not to make "a committal order on the first application (save in the most "exceptional cases; see per Lord Esher M.R. in *Reg.* v. "*Judge of Brompton County Court* (1) but to give the debtor "an opportunity of meeting the judgment by paying instal- "ments adjusted according to his means."

It was common ground between counsel in this case that this is, as one would expect, the normal practice in the county court, and that the order made by the learned judge in this case, namely, a committal order on the first application, there being no previous instalment order, was unusual. I think that well may have led to the error into which I think we are compelled to conclude that the learned judge fell. The fact that he did make a committal order on the first occasion shows that he took, and I have no doubt rightly took, an adverse view of the defendant and her attitude to what it was her duty to do, an order having been made against her. But the position when the matter came before the learned judge was that stated in a later passage in the judgment of Luxmoore J., to which I have referred (2): "Accordingly, "before making a committal order it is essential (see the "observations of Lord Herschell in *Stonor* v. *Fowle* (3) that "the court should satisfy itself that, in respect of the sums "for which the committal order is to issue, it can truly be "said that since the respective due dates the debtor has had "the means of paying them available, but has neglected to "use those means for the purpose of paying them. It is "obvious that the debtor's future prospects of payment have "no bearing on this question." Then a little later: "Since "the committal is a punishment for the proved offence of "dishonestly using for other purposes funds which the debtor "had available to meet the unpaid instalment, there is, prima "facie, no reason why it should not issue forthwith." Those passages refer to instalments, but the principle, of course, applies in a case like the present, where there has been no previous instalment order, to the total of the judgment debt.

Reading the learned judge's notes, I am driven to the conclusion that he did not address his mind to the question: "Am I satisfied that the defendant has dishonestly appro- "priated to other purposes the sum of 31*l.* 0s. 4*d.* in the "eight weeks that have elapsed since the order was made?"

(1) 18 Q. B. D. 213, 217.
(2) 51 T. L. R. 525.
(3) (1887) 13 App. Cas. 20, 30.

C. A.
1949
Barefoot v. Clark.
Somervell L.J.

I think that the last sentence makes that plain, because what he was relying on, and was in my view perfectly entitled to rely on, was that in all the circumstances he was satisfied that the defendant was somebody who got money from her husband from time to time; but I think the amount that he assumed she could get or was getting and would have available for meeting the judgment debt was indicated by that part of his order in which he said she was to pay 2*l.* a month. If that was the extent of her means, that would only have produced some 4*l.* in the two months that had elapsed since the date of the judgment.

For these reasons, I regret that I have come to the conclusion that the learned judge did not apply the law laid down in the judgment of Luxmoore J., and that the appeal should be allowed.

EVERSHED L.J.: I agree, and I share the regret my brother has expressed at the conclusion to which I am forced to come. I am not unmindful of the circumstances in which learned judges of the county court have to administer justice on judgment summonses; nevertheless, this is a case in which the plaintiffs elected to invoke the jurisdiction of the Debtors Act in order to recover their judgment. That being so, the liberty of the subject is at stake, and we are bound to look with strictness at all that has been done on the summons. I do not desire to repeat what has already fallen from my Lord. The order made being unusual in its character, it seems to me that the learned judge did not really apply his mind to the point essential in these cases on the grounds referred to by Luxmoore J.

The result is fortunate for the defendant, for I, for my part, have little doubt that she is untruthful and contumacious. I agree that the appeal should be allowed.

WYNN-PARRY J.: With equal regrets, I agree that this appeal, which has in it no merits, must succeed.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co. for Sarjeant, Bros. & Co., Reading; Norton, Rose, Greenwell & Co., for Collins, Dryland & Thorowgood, Reading.*

H. C. G.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* INGRAM.

C. A.

1949
Mar. 17;
Apr. 5.

Evershed L.J.
and
Wynn-Parry J.

Revenue—Customs—Purchase tax—Wholesale merchants—Commissioners application for information as to goods from whom purchased and to whom sold—Whether liable for information as to sales—Meaning of "purchase"—Finance (*No.* 2) *Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 41, *sub-s.* 1—*Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 20, *sub-s.* 3; *s.* 67.

The Finance Act, 1946, s. 20, sub-s. 3, provides: "Every "person concerned with the purchase or importation of goods "or with the application to goods of any process of manufacture "or with dealings with imported goods shall furnish to the "Commissioners within such time and in such form as they may "require information relating to the goods or to the purchase or "importation thereof or to the application of any process of "manufacture thereto or to dealings therewith as they may "specify . . . ." s. 67, sub-s. 3 provides that the part of this Act relating to purchase tax is to be construed as one with the part of the Finance (No. 2) Act, 1940, relating to purchase tax.

Held, having regard to the definition of "purchase" in s. 41, sub-s. 1, of the Act of 1940, purchase in s. 20, sub-s. 3, of the Act of 1946 must be construed as meaning "any contract which "is a contract of sale within the meaning of the Sale of Goods "Act, 1893"; and therefore that the information that may be required of such a person as is specified in s. 20, sub-s. 3, of the Act of 1946 will relate to such contracts of sale as are made by that person whether as purchaser or seller.

Commissioners of Customs & Excise v. *Ingram* [1948] 1 All E. R. 927 applied.

APPEAL from Finnemore J.

The defendant, Marcus Ingram, had carried on business between October 15, 1946, and January 14, 1947, under the name of Castle Paper Co. and afterwards under the name of Ingram's Associated Distributors. He traded under both names as a wholesale merchant and manufacturer whose business included the selling of goods chargeable to purchase tax. After notices given by the plaintiffs on July 21, 1948, and November 8, 1948, to produce books and accounts including invoices and copy invoices of sales and purchases and in the latter notice to furnish information, had not been complied with, the plaintiffs on November 8, 1948, took out a summons under the Crown Proceedings Act, 1947, s. 14, sub-s. 2 (*d*). By this summons they asked for (1.) an order for the defendant to produce for inspection pursuant to s. 20 of the Finance

C. A.

1949

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* INGRAM.

Act, 1946 (1), all his books and accounts relating to all purchases of goods made from or by him including the relevant invoices and copy invoices of sales and purchases in connexion with business carried on under the above two names ; and (2.) an order for the furnishing, pursuant to the same section, of information, in so far as it was not included in the books and accounts of the names and addresses of the persons from whom goods were purchased and to whom goods were sold by the defendant trading under the above two names, the quantities, description and value of the goods so bought from each supplier and sold to each purchaser and the date of such purchase or sale.

By an affidavit dated November 8, 1948, filed in support of the summons it was stated that the defendant was a person required to be registered by s. 23 of the Finance (No. 2) Act, 1940, or was concerned with the purchase or importation of goods or with the application to goods of a process of manufacture or with dealings with imported goods. The defendant by his affidavit dated November 30, 1948, stated that he did not apply to be registered for purchase tax as he always bought chargeable goods so far as he was aware, inclusive of purchase tax and that for that reason he did not require to be registered. He also stated that he ceased to carry on business in June, 1947, and that the books of account and other records were taken to premises belonging to Ingram's Chain Stores Ld. of which he was a director and that they, with other things, were afterwards stolen on December 13, 1947.

(1) Finance Act, 1946, s. 20, sub-s. 3 provides : " Every person " concerned with the purchase or " importation of goods or with the " application to goods of any " process of manufacture or with " dealings with imported goods " shall furnish to the Commis- " sioners within such time and in " such form as they may require " information relating to the goods " or to the purchase or importation " thereof or to the application of " any process of manufacture " thereto or to dealings therewith " as they may specify . . . ."

Section 67, sub-s. 3 : " Part II " of this Act shall be construed as " one with Part V of the Finance " (No. 2) Act, 1940."

Finance (No. 2) Act, 1940, which in Part V first introduced purchase tax provides in s. 41, sub-s. 1 : " In this Part of this " Act unless the context otherwise " requires the following ex- " pressions have the meanings " hereby assigned to them respec- " tively, that is to say . . . . " ' purchase ' means any contract " which is a contract of sale " within the meaning of the Sale " of Goods Act, 1893 . . . ."

Upon the summons coming before Master Baker it was adjourned ; and the defendant then wrote by his solicitors to the plaintiffs giving certain information in regard to purchases made by him, but no information in regard to his sales. The summons was restored and on December 22, 1948, the master made an order that " the defendant do within twenty-one " days after service of the order give information to the " plaintiffs regarding the goods, of what they consist and " of the persons from whom they were bought and to whom " sold." Finnemore J. dismissed the defendant's appeal from this order. The defendant appealed.

A. P. Marshall K.C. and *Michael Lee* (with them *Platts Mills*) for the defendant.

H. L. Parker and *Littman* for the plaintiffs.

Cur. adv. vult.

April 5. EVERSHED L.J. read the judgment of the court : This appeal raises, for the first time (as we understand) a question of the scope of s. 20, sub-s. 3, of the Finance Act, 1946, relating to purchase tax—namely, whether a " person " concerned with the purchase . . . . of goods " (as the appellant admittedly is, for the purpose of this appeal) can be required to furnish information relating to the sale by him to others of the goods which he purchased. [His Lordship then stated the facts and continued :] Mr. Marshall, on the appellant's behalf, raised no point before us in regard to the order made save in so far as it related to sales made by the appellant. His main contention was that on the true interpretation of sub-s. 3 of s. 20 of the Finance Act, 1946, there was no jurisdiction to make any order in regard to such sales. But Mr. Marshall further contended that having regard to the facts and, particularly, to the length of time which had elapsed since the unfortunate occurrence of Saturday, December 13, 1947 (told to the respondents in July of last year), it would in any event be inequitable now to order the appellant to furnish information in regard to his sales.

It will be convenient to deal first with this latter contention : for it is in our view without substance. The chronology of the present case provides, in our judgment, no ground for saying that the commissioners have been dilatory or unreasonably delayed the issue of proceedings under the Act of 1946. If in truth the appellant, because of the lapse of time, cannot now recall the facts in regard to the relevant sales, that is a matter proper to be taken into account upon any step taken by the commissioners to enforce any order made on this application: but does not disentitle the commissioners to the order if it is within the court's jurisdiction and otherwise proper to make it.

Another minor point taken by Mr. Marshall can also be briefly disposed of. He said that in any case, having regard to the form of summons, any order made on para. 2 thereof must be prefaced by words to the effect "in so far as it is not "included in the books and accounts referred to in para. 1 "of the summons"; notwithstanding that the presence of such a formula would be likely to render the order wholly futile. We have no hesitation in rejecting this contention. The formula in question was clearly inserted parenthetically in the summons on the footing that an order could or would be made on each of its paragraphs and, on that footing, to avoid the imposition of needless duplication of work upon the appellant. Since, on the facts proved in evidence, no order can be made or is sought on the first paragraph of the summons, the sense and purpose of the parenthesis is destroyed. There is no possible ground for limiting any order made on para. 2 by the retention of a formula only intended to be applicable in entirely different circumstances.

We return accordingly to the main question raised on the appeal. The language of sub-s. 3 of s. 20 of the Act of 1946 is, so far as material, as follows: [His Lordship read the sub-section] It is clear from the form of the words used in the sub-section that four categories of persons are comprehended by its terms, namely: those concerned with (i) the purchase of goods; (ii) the importation of goods; (iii) the application to goods of any process of manufacture; and (iv) dealings with imported goods. Mr. Marshall argued that the kind of information which the commissioners may require is likewise divided into categories, each category being appropriate, exclusively, to one of the four classes of "persons" which we have enumerated, plus the further category, that is, information relating to the goods, which (according to the argument) must in the context, mean and mean only information relating to the character of the goods as physical things as distinct from information relating to transactions with the goods. On Mr. Marshall's analysis of the language of the sub-section, it follows that information relating to " dealings therewith " must be confined to dealings with imported goods and that the only words which can be applicable to Mr. Marcus Ingram are " information relating . . . . to the purchase thereof," which (according to Mr. Marshall's argument) must upon the natural acceptation of the language refer only to purchases by the appellant and exclude his sales. Mr. Parker for the commissioners has desired to keep open the question whether Mr. Marshall's analysis is sound and whether, accordingly, the words " information relating to the goods " and " information relating to dealings therewith " can have the restricted significance which Mr. Marshall attributes to them. Mr. Parker's main argument has been that, even if Mr. Marshall's analysis of the sub-section be assumed in his favour, nevertheless the phrase " information relating to the purchase thereof " means and includes, in its context and having regard to certain other sections of the Act of 1946 and of the Finance (No. 2) Act, 1940 (which first imposed purchase tax), not only purchases by the appellant but purchases from him—that is, sales by him of the goods which he purchased.

It must, we think, be conceded that the drafting of the sub-section is not on any view entirely felicitous: and (assuming Mr. Marshall's analysis), it seems to us that a first and natural reading of its terms would confine " purchase " to the purchase by the " person concerned." But s. 67, sub-s. 3, of the Act of 1946, requires that the relevant part of that Act should be read with Part V of the Finance (No. 2) Act, 1940 (which related to purchase tax), and makes applicable to s. 20, sub-s. 3 of the Act of 1946 the relevant definitions contained in s. 41, sub-s. 1, of the Act of 1940: and by the last named sub-section " purchase " is defined to mean—be it observed that the word is " mean " and not " include "—" any contract which is a contract of sale within the meaning " of the Sale of Goods Act, 1893." The remainder of the definition is immaterial. Having regard to this definition, which, as we have stated, must be read into s. 20, sub-s. 3, of the Act of 1946 by virtue of s. 67, sub-s. 3, of the same Act, it is necessary for the purpose of construing the former sub-section to write in, for the word " purchase," the formula contained in s. 41, sub-s. 1, of the Act of 1940. In the result it is in our opinion impossible to restrict the scope of the information which the appellant is required to furnish as Mr. Marshall contends. For the liability of his client is as a person concerned (inter alia) with contracts for the sale of goods (within the meaning of the Sale of Goods Act, 1893) whether as buyer or seller: and the information which he may be required to furnish relates to such contracts made by him, again whether as buyer or seller.

If this view is right then Mr. Parker succeeds upon his main point and it is unnecessary to express any concluded opinion upon the ambit of the other phrases—" information " relating to the goods " or " information relating to dealings " therewith." We must not however be taken, as at present advised, to be suggesting that the commissioners might not well be entitled to succeed also under either or both these phrases. A division of the kinds of information required into categories corresponding with the four classes of " persons " concerned " is, having regard to the language used, prima facie attractive. Nevertheless there remains as a kind of fifth wheel " information relating to the goods," and as a matter of ordinary English it is not easy to see why this phrase should not mean and include information not only as to the character of the goods but also as to what has happened to them. And again, as a matter of ordinary English, it is not easy to see what meaning can fairly be given to the words " thereof," " thereto " or " therewith " save " of the goods," " to the " goods " and " with the goods "; nor to formulate and justify the glosses which would, as we think, necessarily have to be read into the sub-section if Mr. Marshall's construction is to be adopted. In the circumstances however it is unnecessary to express a concluded opinion on these matters.

In our judgment the conclusion at which we have arrived is supported by a consideration of the characteristics of the purchase tax itself and also by the reasoning of this court in an earlier case of the same name as the present: *Commissioners of Customs and Excise* v. *Ingram* (1). In that case the question was as to the extent of the obligation of the defendant Ingram (not the same person as the present appellant) in regard to documents under the concluding words of s. 20, sub-s. 3, of the Act of 1946—" . . . . and shall, upon demand " made by any officer or other person authorized in that " behalf by the commissioners produce any books or accounts " or other documents of whatever nature relating thereto " for inspection by that officer or person at such time and place " as that officer or person may require." On that question

(1) [1948] 1 All E. R. 927.

this court held that the word "accounts" embraced (inter alia) sales invoices or copy sales invoices as well as documents relating to purchases made by the "person concerned." In considering questions such as those raised in the present and in the preceding case, it is not to be forgotten that having regard to the nature and incidence of purchase tax certain traders have imposed on them the duty of adding the tax to their selling prices and of thereby collecting the tax and accounting for it as trustees or agents for the commissioners. The statutory provisions designed to render effective, in such circumstances, the collection of the tax, must, to adopt the phrase of Lord Goddard C.J., in the earlier case, not be given so narrow a meaning as "to stultify" the orders made. It is true that the main point argued in the present case was not directly raised in the earlier case. Nevertheless the general consideration to which Lord Goddard alluded is no less pertinent to the present appeal than it was to the case then before the court. Information relating to sales by "persons concerned in the purchase of goods" is as relevant to the proper administration and collection of the tax as are sales invoices and other documentary evidence of their sales. And it would be indeed anomalous if such persons were bound to produce the accounts in their possession relating to such sales but were not bound (where no documents existed) to give any information in regard thereto. In our judgment therefore the conclusion at which we have arrived is supported by the decision in *Ingram's* case (1) and by the reasoning which underlies that decision.

In the result it follows that the present appeal cannot succeed. But there remains the form of the order which it is proper to make. On this two points arise. In the first place it is observed (and again the language used by the draftsman seems to us unhappily vague) that there is no indication of the form in which the required information is to be given or may be ordered to be given—whether orally, in writing, on oath or otherwise. Secondly it was argued on the part of the commissioners that, once the commissioners have proved the facts, bringing the case within the ambit of the sub-section, the court has no discretion in the matter and is bound to make the order asked for in the general form indicated by the sub-section: and cannot in any way restrict or qualify the obligation imposed on the defendant—for example, in the light of such facts as must be taken to have been proved or conceded in the present case by ordering the defendant to furnish information "to the best of his knowledge "and belief." Having regard to the penal consequences of failure to comply with any order made, it is, on general principles, both necessary and proper that the terms of the order should be as precise as possible and should leave no room for doubting what are the exact obligations imposed thereby. Having regard to the language of the sub-section, we think that there is no jurisdiction in the court to specify the form in which the information must be given. Thus, it is not, in our judgment, competent for the court to order that the information should be furnished on oath or in any particular form. All the court can do is to order the defendant to furnish the information: and he is entitled to do so in any form he chooses. In practice it may well be that the matter is academic. For if, after an order has been made, the commissioners should be dissatisfied with what the defendant may do by way of compliance with the order and should make out a prima facie case for committal or attachment, the defendant would, by his sworn answer, in effect put on oath all that he may have said by way of furnishing information together with his inability to do more.

---

(1) [1948] 1 All E. R. 927.

On the other hand, we cannot think that the court is deprived of all discretion in regard to the order which it makes. In the present case the commissioners have not asked for an order on para. 1 of the summons. But had they done so, we cannot think that the court would not, on the state of the evidence before it, have been entitled to refuse to make an order with which on the evidence it would plainly have been impossible for the defendant to comply. So also it must in our judgment be competent for the court to make such an order for the furnishing of information, that is, an order subject to such limitations and qualifications as in all the circumstances it seems just and proper to make. In other words, the court on such an application as the present can and should make such an order as, on the one hand, will make reasonably clear to the defendant what he is called on to do and, on the other, will not impose on the defendant obligations which are beyond his power to discharge.

After counsel had been heard as to the form of the order, the following order was made: "Order that the defendant "do within twenty-one days from the serving of the order "furnish to an officer of Customs and Excise" (at a specified address) "the following information to the best of his knowledge "and belief or which it is within his control to procure, namely, "(*a*) the names and addresses of the persons from whom "goods were purchased by him trading as the Castle Paper Co. "and trading as Ingram's Associated Distributors, the "quantities, descriptions and values of the goods so bought "from each supplier and the date of each purchase; (*b*) the "names and addresses of the persons to whom goods were "sold by him trading as the Castle Paper Co. and trading as "Ingram's Associated Distributors, the quantities, descriptions "and values of the goods so sold to each purchaser and "the date of each sale."

Appeal dismissed.

Solicitors: *Stanley Moore and Partners; Solicitor for Customs and Excise.*

H. C. G.

ATTORNEY-GENERAL *v.* HUNTER.

1949
Mar. 22, 23, 24.

Morris J.

Customs and Excise—Vessel and tackle used in importation of uncustomed goods—Forfeiture of vessel and tackle—Customs Consolidation Act, 1876 (39 & 40 *Vic. c.* 36), *ss.* 169, 170, 172, 179 *and* 202—*Customs General Order*, 1895 (*St. R. & O.* 66/1895).

Proceedings instituted by writ of appraisement.

In this action the Attorney-General asked for a declaration that the motor vessel *Taku* and a binnacle and compass *Faithful Freddie*, used in certain smuggling operations, were forfeit to His Majesty, as provided by the Customs Consolidation Act, 1876.

The *Taku* was a decked boat privately owned by one Hunter, who claimed to be a United States citizen. In April, 1947, she sailed from Portsmouth to Cherbourg, where a quantity of liquor was purchased and later transferred to a landing craft some 17 miles from the English coast. The liquor, the binnacle and compass, were seized by Customs officials shortly after they were landed, and the ship *Taku* was separately seized the next day.

Held, that (1.) ss. 169 and 170, Customs Consolidation Act, 1876, and the regulations made thereunder have effect territorially and apply to vessels without regard to their owner's nationality. (2.) The notes to the regulations have no legislative force.

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

1949

ATTORNEY-GENERAL *v.* HUNTER.

(3.) A private vessel used in planned smuggling operations is not being used exclusively as a private yacht. (4.) A vessel and her tackle are made use of in the importation of uncustomed goods within the meaning of ss. 172 and 202, Customs Consolidation Act, 1876, notwithstanding that the goods were handled outside territorial waters. (5.) That s. 179 may apply, it is not necessary that the vessel should have had prohibited goods on board within territorial waters: *Attorney-General* v. *Schiers* (1835) 2 C. M. & R. 286, followed.

INFORMATION filed by the Attorney-General tried by Morris J.

The *Taku*, a decked boat of 17.81 net, 37.48 gross tonnage, was at the material time the property of a Mr. A. R. Y. Hunter, who claimed to be a United States citizen. On April 12, 1947, the *Taku* set sail from Portsmouth for Cherbourg, with Mr. Hunter's knowledge, and there a quantity of spirits and wines was purchased. Early next morning these goods were transferred at sea to a landing craft at a pre-arranged rendezvous about seventeen miles off the Dorset coast. The landing-craft then returned to the Dorset coast and unloaded the cargo, together with the binnacle and compass, onto a lorry, which shortly afterwards was stopped at a road barrier by police and customs officers and its contents seized. Mr. Hunter had meanwhile gone aboard the *Taku* and was making for Le Havre, but owing to some engine trouble he altered course for Portsmouth, where his vessel was seized by the customs authorities on April 14, 1947.

On December 11, 1947, on the information of a Customs and Excise officer, a writ of appraisement was issued, in pursuance of which the *Taku* was subsequently valued at 1,600*l.* and the binnacle and compass at 52*l.* On January 7, 1948, a claim was made on Mr. Hunter's behalf that the *Taku* and the binnacle and compass were his. On January 26, 1948, the Attorney-General filed the information which led to these proceedings.

The forfeiture of the ship, and of the binnacle and compass, were claimed under the Customs Consolidation Act, 1876, ss. 169 (and the regulations made thereunder), 170, 172, 179 and 202 (1).

---

(1) Customs Consolidation Act, 1876, s. 169: "The Commissioners "of Customs may from time to "time, by order under their "hands, make such general regu"lations as they shall deem "expedient in respect of vessels "and boats not exceeding one "hundred tons burden for the "purpose of prescribing, with

H. L. Parker and *J. G. Foster* for the informant.

Linton Thorp K.C. and *Eric Myers* for the defendant. Hunter is an American citizen. The nationality of a vessel

reference to the tonnage, build or description of such vessels or boats, the limits within which the same may be employed, the mode of navigation, the manner in which such vessels or boats shall be so employed, and, if armed, the number and description of arms, the quantity of ammunition, and such other terms, particulars, conditions, and restrictions as the same Commissioners may think fit, and also from time to time may revoke, alter, or vary such regulations; and the general regulations made under any former Act, and in force at the time of the passing of this Act, shall remain and continue in force until altered, varied, or revoked."

On August 31, 1895, the Commissioners of Customs issued a Customs General Order (S.R. & O. No. 66/1895) of which the following regulations and note are material:—

"3. Decked boats and vessels not exceeding forty tons burden shall be limited to a distance of four leagues seaward from that part of the coast of England which is between the North Foreland and Beachy Head, and to a distance of twelve leagues seaward from any other part of the coast of the United Kingdom, except those parts of the coasts of England and Ireland which lie opposite to each other.

"7. No extension of the limits hereinbefore assigned will be allowed in respect of any boats or vessels unless on special application from the owner or owners thereof to the said Commissioners, setting forth the ground of such application, and the purposes and object thereof; whereupon if it shall appear to the satisfaction of the said Commissioners, or to the collector, that the grounds of such application are reasonable, and that (having regard to the general character of the master and owners of such boats or vessels, and other special circumstances) any extension of the prescribed limits may properly be conceded, the said Commissioners, or the collector, will exercise the power vested in them of granting special licences for such time, in such manner, and subject to such conditions as to them may seem expedient.

"Note (1.) the foregoing regulations are not intended to apply to boats and vessels exclusively used as private yachts and not for hire, nor to boats or vessels bona fide employed in fishing and for no other purpose, nor to boats or vessels assisting ships in distress beyond the prescribed limits, provided it shall appear to the satisfaction of the Commissioners of Customs, or to the collector, that the said boats or vessels were so employed, and that the masters and owners are men of good character."

Customs Consolidation Act, 1876, s. 170: "Every ship or boat which shall be used or employed in any manner contrary to the regulations prescribed by the Commissioners of Customs shall be liable to for-

1949

ATTORNEY-GENERAL v. HUNTER.

depends on the nationality of her owner: *Union Bank of London* v. *Lenanton*(1); *Chartered Bank of India* v. *Netherlands India Steam Navigation Co. Ld.* (2).

"feiture, unless the same shall "have been specially licensed by "the Commissioners of Customs "to be so used or employed, as "next hereinafter provided."

Section 172: "If any vessel or "boat shall be used in the importation, landing, removal, "carriage or conveyance of any "uncustomed or prohibited goods, "the same shall be forfeited, and "the owner and the master of "every such vessel or boat shall "each forfeit and pay a penalty "equal to the value of such vessel "or boat, not in any case exceeding five hundred pounds."

Section 179: "If any ship or "boat shall be found or discovered "to have been within any port, "bay, harbour, river or creek of "the United Kingdom or the "Channel Islands, or within three "leagues of the coast thereof if "belonging wholly or in part to "British subjects or having half "the persons on board subjects "of her Majesty, or within one "league if not British, having "false bulkheads, false bows, "double sides or bottom, or any "secret or disguised place adapted "for concealing goods, or any "hole, tube, pipe or device "adapted for running goods, or "having on board or in any "manner attached thereto, or "having had on board or in any "manner attached thereto, or "conveying or having conveyed "in any manner any spirits, "tobacco, or snuff, in packages of "any size and character in which "they are prohibited to be imported into the United Kingdom "or the Channel Islands, or any "spirits or tobacco or snuff imported contrary to the Customs "Acts, or any tobacco stalks, "tobacco stalk flour, or snuff "work, or which shall be found or "discovered to have been within "three leagues of any part of the "coast of the United Kingdom "from which any part of the "lading of such ship or boat shall "be or have been thrown overboard, or on board which any "goods shall be or have been "staved or destroyed to prevent "seizure, every such ship or boat "together with any such spirits, "tobacco, snuff, tobacco stalks, "tobacco stalk flour, or snuff "work, and all packages, casks, or "other vessels containing the "same, and everything packed "therein, and also any cordage, "or other articles adapted and "prepared for slinging or sinking "small casks, or any casks or "other vessels whatsoever of less "size or content than twenty "gallons of the description used "for the smuggling of spirits "found on board, shall be forfeited; and every person who "shall be found or discovered to "have been on board any ship or "boat liable to forfeiture as aforesaid, within three leagues of the "coast if a British subject, or "within one league if a foreigner, "or on board any vessel in her "Majesty's service, or on board "any foreign post office packet "employed in carrying mails "between any foreign country and "the United Kingdom having on "board any spirits or tobacco in "such packages as aforesaid, or "any tobacco stalks, tobacco stalk "flour, or snuff work, shall forfeit "a sum not exceeding one hundred

---

(1) (1878) 3 C. P. D. 243.

(2) (1883) 10 Q. B. D. 521.

The regulations issued under s. 169, Customs Consolidation Act, 1876, do not apply to foreign vessels. Where the Act is intended to apply to foreign vessels it says so, e.g., s. 179: there is no such reference in s. 169, therefore regulations made thereunder do not apply to foreign vessels.

Alternatively, if the *Taku* was a British ship, the regulations do not apply as she was a yacht. Test of a yacht is private ownership and user; the character of "yacht" is lost only by hire: note (I.) to regulations. The mandatory words of the note require it to take effect as a regulation. The fact that customs officials gave her clearance papers from Ramsgate in 1946 without requiring a licence shows that she is a yacht.

The *Taku* was never used in the conveyance of "uncustomed" goods within s. 172: the transhipment was outside territorial waters, where no goods can properly be described as uncustomed.

"pounds, and every such person "may be detained and taken "before any justice, to be dealt "with as hereinafter directed; "provided that no person shall be "detained whilst actually on "board any vessel in the service "of a foreign State or country.

Section 202: "All ships, boats, "carriages, or other conveyances, "together with all horses and "other animals and things made "use of in the importation, land- "ing, removal, or conveyance of "any uncustomed, prohibited, "restricted or other goods liable "to forfeiture under the Customs "Acts shall be forfeited, and all "ships, boats, goods, carriages, "or other conveyances, together "with all horses and other animals "and things liable to forfeiture, "and all persons liable to be de- "tained for any offence under the "Customs Acts, or any other Act "whereby officers of Customs are "authorized to seize or detain "persons, goods, or other things, "shall or may be seized or de- "tained in any place either upon "land or water by any of the "following persons, being duly "employed for the prevention of "smuggling, that is to say, any "officer of her Majesty's army, "navy, marines, coastguard, Cus- "toms, or Excise, or by any per- "son having authority from the "Commissioners of Customs or "Inland Revenue to seize, or by "any constable or police officer of "any country, city or borough in "the United Kingdom so em- "ployed with the sanction of the "magistrates having jurisdiction "therein, or under or by virtue of "any Act in relation thereto; and "all ships, boats, goods, carriages, "or other conveyances, together "with all horses and other animals "and things so seized, shall forth- "with be delivered into the care "of the collector or other proper "officer of Customs at the nearest "Custom House; and the for- "feiture of any ship, boat, carriage "animal, or other things shall be "deemed to include the tackle, "apparel, and furniture thereof, "and the forfeiture of any goods "shall be deemed to include the "package in which the same are "found and all the contents "thereof."

The words of s. 179 mean that, in the case of a foreign vessel, she must have been discovered either with contraband on board within one league, or having had contraband on board within one league of the British coast, in order to be forfeit. This conforms with the general limits of criminal jurisdiction in English law. Unless a statute clearly says so, Parliament does not arrogate jurisdiction over a foreigner's acts on a foreign ship outside territorial waters. *Attorney-General* v. *Schiers* (1) is distinguishable as it was decided on a different statute and on the facts there was sufficient evidence to imply that the transhipment occurred within the jurisdiction. Dictum of Lord Abinger C.B. that a vessel which transferred contraband to another ship outside one league, and later came into territorial waters, would be forfeit was obiter, and not binding on this court.

Foster in reply. The proper construction of this act is that where, as in s. 169, it refers to boats and vessels in general, then all vessels of whatever nationality are intended; where the act distinguishes between British and foreign vessels, it says so, e.g., s. 179. This Act is saying that where a foreigner does a certain act abroad, and then comes within the jurisdiction having done it, then the penalty of forfeiture applies. English law does not hesitate to make an act by a foreigner abroad subject to penalty; residence not nationality is the usual criterion. The regulations are intended to stop smuggling, irrespective of the nationality of the ship.

Even if the *Taku* is a yacht, note (1.) is not a part of the regulations and has no legislative force. But even if note (1.) is applicable, it requires "exclusive" use as a private yacht. The voyage to Cherbourg and purchase of liquor for sale was not such use.

The nationality of Hunter is irrelevant, as regulations apply to foreigners; in any case the evidence of Hunter's American nationality is insufficient.

The fact that the goods may have been "uncustomed" when *Taku* handled them is irrelevant. The penalty in s. 172 is imposed on vessels "used in the importation" of uncustomed goods. The goods were "uncustomed" at the time of import, and the *Taku* was made use of in that import. Sections 172 and 179 apply whether or no the transhipment took place in territorial waters.

Attorney-General v. *Schiers* (1) decided precisely the point in this case, namely that a ship was properly forfeited which had had on board prohibited or uncustomed goods and was then found within a league of these shores during the course of the same voyage. There is no real distinction between the wording of s. 179 of the Act of 1876 and that of s. 2 of the Statute 3 & 4 William 4, c. 53, on which *Attorney-General* v. *Schiers* (1) was decided.

---

(1) (1835) 2 C. M. & R. 286.

MORRIS J. referred to the issue of the writ of appraisement and the laying of informations leading up to these proceedings, and continued :—

The forfeiture of the ship *Taku* and of the binnacle and compass are claimed by His Majesty's Attorney-General under various provisions of the Customs Consolidation Act, 1876, the sections in question being ss. 169, 170, 172, 179 and 202. It is submitted on behalf of the Attorney-General that the forfeitures are justifiable under those sections alternatively, so that there are three sections or groups of sections under which the forfeiture becomes appropriate.

The *Taku* was seized in Portsmouth, or near to Portsmouth harbour, on April 14, 1947. What had taken place before that seizure was that Mr. Hunter, in conjunction with certain other people, conceived, quite deliberately, the plan of infringing and breaking the provisions of the Customs Act, and they carefully prepared a scheme whereby they would smuggle into this country a quantity of spirits and wines which they knew ought only to be imported if customs duties were paid, and they devised a plan under which they would procure the spirits and wines, would land them in England, and then would presumably sell them for gain.

[His Lordship described the voyage of the *Taku* to Cherbourg and the events which led to her seizure, and that of the binnacle and compass, by the customs authorities, and then proceeded :]

Now on those facts it is said on behalf of the Attorney-General that forfeiture of the *Taku* and of the compass should take place under ss. 172, 179 and 202. It is further said that forfeiture should take place under ss. 169 and 170, for the reason that the *Taku* is shown to have proceeded beyond the limits permitted to a vessel of her size, having regard to the regulations issued pursuant to s. 169.

(1) 2 C. M. & R. 286.

The matters principally alleged on behalf of Mr. Hunter arise from the fact that it is said that Mr. Hunter is an American citizen, and a passport issued a few days ago by the United States Consulate in Southampton to Mr. Hunter is produced and in part is relied upon in support of that contention. It is said that if he is, then the *Taku* is not a British ship; and that if the *Taku* is not a British ship, the regulations issued under s. 169 do not apply and that therefore forfeiture under ss. 169 and 170 does not arise.

As regards the other sections, it is said that the evidence shows that the transfer of the liquor from the *Taku* to the landing craft took place more than one league from the British coast and that therefore nothing was done within territorial waters by the *Taku* which renders her liable to seizure under the provisions of ss. 172, 179 and 202. Various other defences were advanced by Mr. Myers, who presented a very careful and well-sustained argument in advancing the contentions of Mr. Hunter.

The evidence in regard to the place of the rendezvous is given by Mr. Hunter, and beyond his evidence there is the evidence of Mr. Lee, who said that before the rendezvous of the *Taku* and the landing craft was reached he had seen marker buoys, and also what appeared to be the silhouette of land looking rather like a big rock; but he also said that because of the dark conditions that prevailed it may well be that he mistook a shadow for land and wrongly supposed that he saw land. Mr. Hunter located the rendezvous on an Admiralty chart and said that it was seventeen miles from the nearest land. There was other evidence in regard to the course taken by the landing craft and in regard to the time taken by the landing craft after leaving the rendezvous and before the place of landing was reached. I think the evidence does support the view that the transhipment did take place more than a league from the coast.

The provisions of s. 169 of the Act give power to the Commissioners to make regulations as they deem expedient in respect of certain vessels, and regulations were issued on August 31, 1895. Those regulations have been proved in evidence and they are conveniently set out at p. 212 of Highmore's "Customs Laws," 3rd ed. At the end of those regulations are two notes, numbered respectively note (1.) and note (2.). The third regulation provides as follows: "Decked boats and vessels not exceeding forty tons burden "shall be limited to a distance of four leagues seaward from "that part of the coast of England which is between the "North Foreland and Beachy Head, and to a distance of "twelve leagues seaward from any other part of the coast "of the United Kingdom, except those parts of the coasts "of England and Ireland which lie opposite to each other." Then by regulation 7 it is provided that no extension of the limits assigned will be allowed in respect of any boats or vessels unless on special application from the owner or the owners thereof to the Commissioners, setting forth the ground of the application and the purposes and the object of the application; and the regulation provides that if it shall appear to the satisfaction of the Commissioners, or to the collector, that the grounds of such application are reasonable and that, having regard to the general character of the master and owners of such boats or vessels, and other special circumstances, any extension of the prescribed limits may properly be conceded, then the Commissioners, or the collector, will exercise the power vested in them of granting special licences. It is established that no special licence was granted in respect of the *Taku*.

[His Lordship read note (I.) and proceeded :]

It is submitted by Mr. Myers that that note forms a part of the regulations. Mr. Foster submits that the note is not a part of the regulations, but is to be regarded as being by way of an explanatory memorandum showing the circumstances in which the Commissioners would act, given certain conditions. Mr. Myers submits that if the note applies as being a part of the regulations, the *Taku* comes within the words "vessels exclusively used as private yachts and not "for hire." He points to certain documents which have been produced on which the word "yacht" appears, and he submits that the *Taku* was a private yacht and that it was not for hire and that therefore the regulations do not apply. That is a submission which he makes as a subsidiary one to his main submission that these regulations do not apply at all and that s. 169 does not apply at all, save in the case of a British ship.

Section 169 gives the Commissioners power from time to time to make general regulations as they shall deem expedient in respect of vessels and boats of a certain size. Mr. Foster submits that, in the absence of a contrary indication, that section must apply territorially and that therefore it applies to all vessels and boats within the jurisdiction.

It is apparent from a consideration of many of the sections of this Act that in places the legislature is dealing with all ships, in other places it is dealing only with British ships. For example, in s. 140 of the Act there is a reference to "All "trade by sea from one part of the United Kingdom to any "other part thereof" being "deemed to be a coasting trade"; and the section says: "and all ships while employed therein "shall be deemed to be coasting ships." The following section, s. 141, begins with the words: "Every foreign ship "proceeding either with cargo or passengers or in ballast"; and s. 170 begins with the words: "Every ship or boat "which shall be used or employed," and then goes on to enact that every such ship or boat "used or employed in any "manner contrary to the regulations prescribed by the Commissioners of Customs shall be liable to forfeiture, unless the "same shall have been specially licensed by the Commissioners "of Customs to be so used or employed, as next hereinafter "provided."

Section 175 refers to "The owner of every ship belonging "wholly or in part to any of Her Majesty's subjects"; and then s. 176, which follows, speaks of "The owner of every "vessel or boat." It is perhaps interesting to look at the terms of s. 176, having regard to some of the contentions in regard to the regulations. Section 176 provides as follows: "The "owner of every vessel or boat, whether decked, partially "decked, or open, not being of the burden of one hundred "tons, and not belonging to any ship, shall paint or cause "to be painted upon the outside of the stern of such boat "in white or yellow Roman letters, of not less than two inches "in length, on a black ground, the name of the owner of the "boat and the port to which she belongs, on pain of the "forfeiture of such boat not so marked, wherever the same "shall be found."

That section, in my judgment, is of interest as showing that the legislature is speaking of "every vessel or boat," and further that the legislature is referring to a port or place to which a vessel belongs. Those words clearly do not mean that there is some ownership in the port or place; those words indicate the port or place where the vessel is based, or where she is normally kept, or where she is ordinarily to be found: they do not have reference to ownership.

Then it has been pointed out in the course of the submissions that s. 179 refers both to ships belonging to Her Majesty's subjects and to foreign ships. Section 180 begins with the words "If any ship or boat belonging wholly or in part to "Her Majesty's subjects." Section 183 refers to "any ship "or boat"; s. 202 refers to "All ships, boats, carriages, or "other conveyances."

It seems to me that a consideration of the various sections in this part of the Act shows that when Parliament is limiting the application to foreign ships or limiting the application in any other way, it so provides; and if Parliament refers to vessels and boats without a limitation, as it does in s. 169, then, in my judgment, the regulations made under that section have effect territorially and they would have effect even if it were shown that the craft or vessel otherwise covered by the regulations was owned by someone not a British subject.

In regard to the points taken by Mr. Myers about note (I.), to which I have already referred, in my judgment note (I.) is not to be regarded as a part of the regulations: it is by way of an explanatory memorandum. If the note did apply, then Mr. Myers has submitted that the *Taku* came within the words "exclusively used as private yachts and not for "hire." The *Taku* does not appear to have been on hire, but on the facts before me it would be quite unjustifiable to hold that the *Taku* was used exclusively as a private yacht. The *Taku* was used, on the occasion when she went to Cherbourg, to carry out a highly organized plan whereby, in order, presumably, that gain should be made, prohibited and uncustomed goods should be brought into this country. It would be unreasonable and it would be a violation, in my judgment, of commonsense to say that the *Taku* on those night adventures was being used exclusively as a private yacht.

Then it is said by Mr. Myers in reference to this part of the case that the Attorney-General ought not to rely on the breach of the regulations, as I understand the argument, for the reason that some documents are in existence which appear to suggest that it was shown on a previous occasion that the *Taku* was going from Ramsgate to Boulogne. It is said, as I followed the argument, that Boulogne would be at a distance from the British coast beyond that permitted, apart from licence, to the *Taku*, and my attention was directed to a clearance label issued on August 14, 1946, at Ramsgate and to a document issued on July 25, 1946, also at Ramsgate, which is a document by which an officer of His Majesty's Customs and Excise gave a bill of health to the *Taku*. The part of the document relied upon is as follows: "Whereas "the vessel called the yacht 44259 of London, whose Master "is Lieut. P. Steinmann, is about to sail from the port of "Ramsgate on this 25th day of July, 1946, and from thence "for Boulogne and other places beyond the seas, with five "persons on board including the Master. Now know ye that "I, the said officer, do hereby make it known to all men, "and pledge my faith thereunto, that at the time of granting "these presents, no Plague, Epidemic, Cholera, nor any "dangerous or contagious disorder exists in the above port "or neighbourhood."

I think I can take notice of the fact that there must be many departments of His Majesty's Customs and Excise, and I think it is an unreasonable assumption to say that because somebody, in the performance of his duties, said in July, 1946, that there was no plague, epidemic or cholera in Ramsgate, he was recognizing that the *Taku* had authority to go to Boulogne. Whoever gave that certificate was not under a duty to ask Mr. Hunter whether he had complied with the law. Mr. Hunter could not take that bill of health as being some kind of permission from the Customs and Excise to do that which he was not entitled to do without a licence. There is, in my judgment, no validity in the contention advanced on the basis of those documents. It is said that the Customs authorities knew that the *Taku* was going to France. When analysed, it appears that somebody, giving a bill of health, gives it on a form in which it is said that the *Taku* is going to Boulogne, but that does not imply that he is saying "and "you need not comply with any other regulation imposed "by the Customs Act."

I have dealt with this matter so far on the basis either that Mr. Hunter is or on the basis that he is not an American citizen, and in my judgment, whichever is the correct position in that matter, forfeiture is justifiable because of a breach of the regulations made under s. 169.

I pass now to consider the other sections, and it may be convenient to look at s. 202. That provides, so far as its operative words are concerned, that: "All ships, boats, "carriages, or other conveyances, together with all horses "and other animals and things made use of in the importation, "landing, removal, or conveyance of any uncustomed, "prohibited, restricted, or other goods liable to forfeiture "under the Customs Acts shall be forfeited, and all ships, "boats, goods, carriages, or other conveyances, together "with all horses and other animals and things liable to "forfeiture, and all persons liable to be detained for any "offence under the Customs Act, or any other Act whereby "officers of Customs are authorized to seize or detain persons, "goods, or other things, shall or may be seized or detained "in any place either upon land or water by any of the following "persons": and then the officers are set out. Then the end of the section reads: "and all ships, boats, goods, carriages, "or other conveyances, together with all horses and other "animals and things so seized, shall forthwith be delivered "into the care of the collector or other proper officer of Customs "at the nearest Customs House; and the forfeiture of any "ship, boat, carriage, animal, or other things shall be deemed "to include the tackle, apparel, and furniture thereof, and "the forfeiture of any goods shall be deemed to include the "package in which the same are found and all the contents "thereof."

In regard to the binnacle and compass, they were clearly used on the landing craft, and they were therefore used in the importation and landing of the goods. The goods are clearly shown to have been prohibited goods and uncustomed goods. In para. 6 of the information of the Attorney-General it is said that the compass, being part of the tackle, apparel and furniture of the motor vessel *Taku*, was made use of in the importation and conveyance of uncustomed and prohibited goods. It is not shown—in fact the contrary is shown—that the binnacle and compass were ever part of the tackle, apparel and furniture of the *Taku*. Application has been made to me for leave to amend the information by omitting the words "being part of the tackle, apparel and furniture of the motor "vessel *Taku*." That application has been resisted, for it is said that these are forfeiture proceedings and amendments ought not to be allowed unless there is a very strong case for an amendment. In my judgment, it is really immaterial whether this amendment is allowed or not. I see no sort of embarrassment to the defendant if this amendment is allowed, and no sort of suggestion has been made that any adjournment would be necessary because of this amendment. As it has been asked for, I allow the amendment; but, in my judgment, it is quite immaterial whether those words are left in the information or not: those words are not established, but the remaining words of this paragraph are proved, and it is clear that the binnacle and compass were made use of in the importation and conveyance of uncustomed and prohibited goods, and there can be therefore no answer to the claim for forfeiture of the binnacle and compass.

Perhaps it may be convenient, before stating my views, in regard to this section, if I refer also to s. 179, because the arguments of Mr. Myers on this part of the case cover the claims for forfeiture, both under s. 179 and under s. 202. Section 179 is a very long section and I only quote some of its words. I think the operative words are these: "If any ship or boat "shall be found or discovered to have been within any port, "bay, harbour, river, or creek of the United Kingdom or the "Channel Islands, or within three leagues of the coast thereof "if belonging wholly or in part to British subjects, or having "half the persons on board subjects of Her Majesty, or within "one league if not British, having" (and then I leave out a number of words which do not apply) "had on board . . . . "or conveying or having conveyed in any manner any "spirits . . . . which . . . . are prohibited to be imported "into the United Kingdom," then every such ship or boat, together with any such spirits, shall be forfeited.

I think I have referred to all the necessary operative words, but the whole section must, of course, be looked at, as it has been during the course of the submissions, in order fully to consider it. What is said by Mr. Myers is that if the transhipment occurred more than one league from the British coast, then this section does not apply, and that similar reasoning will have the result that s. 202 does not apply. It is said by Mr. Myers that the *Taku* transhipped outside territorial waters beyond the one league from the coast and that the words in the section "having had on board" are referable, not to a situation where a ship comes within territorial waters without prohibited goods on board but has had them outside the limit, but that those words only have reference to the case where a vessel comes within the one league with the prohibited goods and then is either found with the goods on board or is found within the distance of one league having had the prohibited goods on board within one league.

Before I deal with that contention of Mr. Myers I ought to mention that there were subsidiary contentions on this part of the case. Mr. Myers said that in any event when the

Taku came into Portsmouth she did not come in as part of the voyage in the course of which the liquor had been transhipped. His reason for that contention was that Mr. Hunter said that the *Taku* had set course for Le Havre and had then changed course. In my judgment, that is not a valid contention. Even assuming that the *Taku* did start for Le Havre, this was clearly the same voyage.

Then Mr. Myers said that when the *Taku,* outside the limit of the league from the shore, was transhipping the liquor she was not dealing with prohibited goods. In my judgment, one must look at the whole of the facts and one must have in mind that this was a planned adventure and that it was one part of the plan that at a particular point these goods intended to be landed on the English coast without paying duty should be transhipped. In my judgment, that contention of Mr. Myers is not a valid one.

Now I come to deal with what was the main submission on this part of the case. This very point did come up for discussion and consideration in the case of *Attorney-General* v. *Schiers* (1), a case in the Court of Exchequer. Mr. Myers submits that the words of Lord Abinger C.B. in that case in giving the decision of the court should be regarded as being obiter in reference to this matter. The section then in question was s. 2 of the Statute 3 & 4, William 4, c. 53. Mr. Myers referred me to the actual wording of that section. Having looked at it, it does not seem to me that it differs in essentials, for present purposes, from the section that I am now considering, namely, s. 179. Section 2 of the older Act has these words: " Any such vessel or boat so found " or discovered having on board or in any manner attached " thereto or having had on board or in any manner attached " thereto or having or having conveyed in any manner any " spirits "—and then I need not read the remaining words, which define the particular illegality in reference to the spirits.

Now having looked at the case of *Attorney-General* v. *Schiers* (1), it seems to me that the very point now raised was before the court in that case. The facts are very short and are set out on p. 287. It appears that on the night of July 6, 1834, between twelve and one o'clock, certain Customs officers went on board a boat called *La Marie,* which was about half a mile from the shore. The officers found on the boat three French and two English sailors, without provisions or compass, and seventy-one casks of foreign spirits. They proceeded to

(1) 2 C. M. & R. 286.

take that boat to shore, but before they got to the shore and when it was about half an hour after they had captured the boat they saw another boat called the *Bien Aimé* lying becalmed at a distance of three-quarters of a mile from them and within half a mile of the shore. An officer went to that boat and when he boarded her he found there were marks of casks in the hold and a strong smell of spirits; and the clothes of the boat's crew and other clear indications left no doubt that the boat first seized had taken contraband spirits from the boat later reached.

The trial was with a jury and the report recounts that the defendant's counsel contended that to support a condemnation pursuant to the statute on which the information was founded it must appear that the vessel had the prohibited goods actually on board within a league of the coast, of which there was no proof in the case, so he contended. The Lord Chief Baron directed the jury that in his opinion the vessel was liable to forfeiture if she unshipped the prohibited goods more than a league off the coast and afterwards came within that distance. Then the matter was left to the jury and the jury found a verdict for the Crown.

It seems to me that the direction of the Chief Baron was most important, and a consideration as to whether that direction was right was of the essence of the case in the Court of Exchequer. The jury, having the facts before them, might have come to the conclusion on those facts that what had happened was that there was a transhipment beyond the league and that thereafter the *Bien Aimé* had come within territorial waters. It was obvious, therefore, that the jury had to be told whether, if that was the view they formed on the facts, a forfeiture according to law should take place, and if the Lord Chief Baron had wrongly directed the jury, then a rule would have been granted. The report does not indicate who was sitting in the court, but the court intimated that they would take time to look into the Act of Parliament. The Lord Chief Baron was Lord Abinger, and the Barons of the Court of Exchequer at that date were Sir James Parke, Sir William Bolland, Sir Edward Hale Alderson and Sir John Gurney. In his reserved judgment, Lord Abinger C.B. said this " In this case we delayed granting " a rule until we had looked more fully into the statute. On " looking into it we think there is no foundation for the " distinction taken by Mr. Jervis." (He was the counsel.) " The provision which renders a vessel liable to forfeiture, "having had contraband goods on board before entering "the prohibited limits, is applicable only to the particular "voyage in which she both discharges the goods and enters "the prohibited limits. It cannot be supposed that the legislature contemplated anything so absurd as to provide against "the case of a vessel having had prohibited goods on board "somewhere or other twenty years before, and then coming, "twenty years afterwards, within a league of the coast. "The statute seems indeed to be directed against the very "case of a vessel, having had goods on board in prohibited "packages, discharging them before she enters the specified "limits, and then following, to assist in the landing or receive "back the crew"; and so a rule was refused.

In my judgment, for the reasons I have given, that decision is directly in point in regard to the contention now raised and the words "having had on board" ought not, therefore, in my judgment, to be limited in the way suggested by Mr. Myers. Mr. Myers is, in effect, asking that the court should say that the words "having had on board" should be read as though they were "having within the distance of "one league had on board." Parliament did not so enact.

I hope I have dealt with all the points so cogently raised by Mr. Myers in regard to these two sections. For the reasons I have given, in my judgment the provisions of s. 179 are applicable to the facts of this case and the provisions of s. 202 are also applicable. Under s. 202 it seems to me plain that the *Taku* was made use of in the importation and landing of uncustomed, prohibited or restricted goods. It is all the more plain that that is so because the court knows that this was a plan devised in England with reference to craft in England, one of which craft was to go over to the French coast and then return, and which craft did return to Portsmouth harbour. Those considerations are not in themselves conclusive in regard to this section but they make it all the more plain, in my judgment, that this craft was "made use of."

I have shown, by what I have said, that this forfeiture, the forfeiture of the *Taku* and of the compass, is justifiable, whatever be the nationality of Mr. Hunter, and, therefore, I do not find it necessary to deal with that part of the case.

Judgment for the Crown, with costs.

Solicitor for the informant: *Sir Nazeby Harrington, Solicitor for the Customs and Excise.*

Solicitors for the defendant: *H. Myers & Son.*

C. C. A.

1949
Feb. 28.

Lord Goddard C.J. and Humphreys and Birkett JJ.

REX *v.* PORTER.

Criminal law—Gaming and wagering—Betting in a public house—Bookmaker's acceptance of bets without the knowledge of the licensee—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 3.

Costs—Liability of appellant whose appeal is dismissed—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 5.

A bookmaker, who while himself taking refreshment in the saloon bar of a public house, habitually accepts bets from other customers in the bar, is guilty of using the premises for the purpose of betting with persons resorting thereto contrary to s. 3 of the Betting Act, 1853, notwithstanding that the licensee of the premises has not permitted him to do so and is unaware of his activities and notwithstanding that he, the bookmaker, does not carry on his operations in any one particular part of the bar.

Rex v. *Deaville* [1903] 1 K. B. 468, which decided to the contrary must be taken to have been overruled by *Milne* v. *Commissioner of Police for City of London* [1940] A. C. 1 and is no longer law.

APPEAL against conviction.

The appellant Charles Porter, a bookmaker, was convicted at London Sessions on an indictment charging him with using a public house for the purpose of betting with persons resorting thereto contrary to s. 3 of the Betting Act, 1853 (1).

Observation was kept by police officers on the appellant, a bookmaker, for a period of about two weeks, and on five days during that period he was seen in the saloon bar of a public house taking bets to the number of forty-five in all. He did not always occupy the same position in the room but moved freely from place to place. On each occasion he took some refreshment while he was in the bar. It was not shown that the licensee of the public house or his agent knew what was being done.

The learned Deputy Chairman in his summing up directed the jury that it was not necessary for the prosecution to prove that the bookmaker enjoyed a privileged place in licensed premises or that the licensee permitted him to accept bets on the premises, in order to bring the defendant within the term "used" within the meaning of s. 3 of the Betting Act, 1853.

[Reported by Miss JANE GRIFFITHS, Barrister-at-Law.]

---

(1) Betting Act, 1853, s. 3: "Any person who being the owner "or occupier of any house, office, "room or other place, or a person "using the same, shall open, keep "or use the same [for the purpose "of betting with persons resorting "thereto] shall be liable to be "convicted."

C. C. A.
1949
REX
v.
PORTER.

He was of opinion that mere localization of the bookmaker at the premises by regular attendance over a period of time was sufficient to bring him within the statute, and on his direction the jury convicted. The appellant appealed.

Edward Clarke for the appellant. The learned Deputy Chairman was wrong in directing the jury that it was unnecessary for the prosecution to prove either that the licensee permitted betting by the bookmaker, or that the bookmaker enjoyed a privileged place in the premises. He wrongly held that " localization " by the bookmaker at the premises by regular attendance over a period of time was sufficient to establish " user " as defined by the Betting Act, 1853.

The " person using " must be a person analogous to and of the same genus as the owner, occupier or manager and he must have at least de facto control of the premises : *Powell* v. *Kempton Park Racecourse Co.* (1) ; *Belton* v. *Busby* (2) ; *Rex* v. *Deaville* (3). The ratio decidendi in *Milne* v. *Commissioner of Police for City of London* (4) was that communication by telephone from a club to a bookmaker did not make the bookmaker a person " using." Those parts of their Lordships' speeches criticizing *Rex* v. *Deaville* (3) were obiter. That case is still good law, is binding on this court and is indistinguishable from this case. There was therefore no evidence of a contravention by the appellant of s. 3 of the Betting Act, 1853.

Vernon Gattie for the prosecution was not called on.

LORD GODDARD C.J. after stating the facts and reviewing the evidence continued : It is not necessary, I think, for this court now to consider *Powell* v. *Kempton Park Racecourse Co.* (1) for the reason that it has much more recently, namely in 1939, been explained by the House of Lords. One part of Lord Halsbury L.C.'s speech in the House of Lords, however, ought to be noticed. He was dealing there with the question whether Tattersall's Ring at Kempton Park could be a " place " within the meaning of the Act, and he held it was not and that was the decision of the majority of their Lordships. However, in the speech which he as Lord Chancellor delivered, which was of course the leading speech in the case, he expressly referred to the judgment of Smith L.J. when the case was in the Court of Appeal, and described it as an illuminating judgment. It is worth noting that Smith L.J. said in that case (1): " I do not propose to deal with the numerous cases " which have arisen about the user of rooms at public houses " by betting men when carrying on their business of betting " with persons resorting thereto, for the words 'house' " and 'room' are specifically mentioned in the Act as two of " the prohibited places, when used by a betting-man for the " carrying on the business of betting therein, and in my " judgment these cases have no application to betting in an " inclosure at a racecourse in the usual way as in the present " case." When one remembers that *Powell* v. *Kempton Park Racecourse Co.* (2) was dealing merely with betting in Tattersall's Ring at a racecourse, it is impossible to suppose that the noble and learned Lords who formed the majority in that case meant to say that all the public house cases, as the Lord Justice called them, were wrong. His judgment was cited and noted for special approval by the Lord Chancellor, and there you have a distinct expression of opinion by the Lord Justice that they were not considering the cases such as the present one of people betting in public houses, and that the decision was not intended to throw any doubt on them, because it must be remembered that the Court of Appeal in that case (Rigby L.J. dissenting) had come to the same decision on the point before them, as did the House of Lords.

---

(1) [1899] A. C. 143.
(2) [1899] 2 Q. B. 380.
(3) [1903] 1 K. B. 468.
(4) [1940] A. C. 1.

That case having been decided, a variety of other cases followed on. One of the cases to which we have been referred was the case of *Belton* v. *Busby and Woods* (3), in which the facts were that " a bookmaker was in the habit of attending " at the bar of a licensed beerhouse daily at certain hours " for the purpose of betting with persons resorting thereto, " and he carried on there a business of ready-money betting " with the knowledge and permission of the licensed occupier " of the beerhouse " and it was held that the bookmaker used the bar of the beerhouse for the purposes prohibited by the Act. Mr. Clarke relied on the judgment of Grantham J. in that case, who followed in terms the decision in the *Kempton Park* case (2). There, there was a knowledge on the part of the licensee, and the learned judge said this: " There is, " it seems to me, this great distinction between the racecourse

(1) [1897] 2 Q. B. 279.
(2) [1899] A. C. 143.
(3) [1899] 2 Q. B. 380.

" cases, such as *Powell* v. *Kempton Park Racecourse Co.* (1) " and the present, that in the former the bookmakers and the " members of the public who bet with them go into the race- " course inclosures on exactly the same footing; the place " is open to them both on the same terms; the one has no " greater right to be there than the other. But that was not " the case here. The bookmaker Woods had something " in the nature of a right or licence to use the bar of the beer- " house for the purposes of his betting business over and " above the right of an ordinary member of the public to resort " there. This seems clear from the findings of the magistrate. " The case finds that he was allowed to remain there regularly " for certain hours every day." There, the learned judge had no difficulty in saying that that case was distinguishable from *Powell* v. *Kempton Park Racecourse Co.* (1) and he was applying the very passages in Lord Halsbury's speech upon which so much reliance has been placed by Mr. Clarke.

Bruce J. did not put his judgment on that ground at all. He followed the ground mentioned by A. L. Smith L.J. to which I have just referred and which was cited with approval in the House of Lords in *Powell's* case (1).

Bruce J. said (2): " I think that the room, the saloon " bar, was used by Woods for the purpose of betting with " persons resorting thereto. I think that Woods was a person " using the room in the sense that he regularly resorted there " for the purpose of carrying on the betting business, and was " the person in control of that business "—that is to say, the betting—" therefore, I entertain no doubt that he was guilty " of an offence against the Betting Act." I need not read the rest. He held that the bookmaker in that case would be guilty of an offence.

The next case to which it is necessary to refer is the much canvassed case of *Rex* v. *Deaville* (3). That was a case in the Court of Crown Cases Reserved, and there is no doubt that the court in that case did hold that there could not be a conviction unless it could be shown that the bookmaker was carrying on his betting there with the consent express or implied of the licensee, and as it had not been proved in one of the cases that the licensee had knowledge that the man was carrying on the business of a bookmaker the conviction

---

(1) [1899] A. C. 143.
(2) [1899] 2 Q. B. 380, 384.
(3) [1903] 1 K. B. 468.

C. C. A.

1949

REX
v.
PORTER.

was quashed. If that case had stood alone, it may be it would have been decisive of this case, because that case would be in the ordinary way binding on this court, and it would be difficult indeed to distinguish the facts in that case from those in this case. But when you find that a case, whether it has been expressly overruled or not by the final Court of Appeal, has been dealt with, or the facts, which were the governing facts in a particular case, have been regarded in a totally different manner by the final Court of Appeal, so that it is obvious in the opinion of the final Court of Appeal that the cause was wrongly decided, then whether they have in terms said they overrule the case or not, I think this court ought to treat the case as overruled. I may cite what Lord Wright said in *Noble* v. *Southern Railway Co.* (1), when he dealt with this very sort of point. That was a case under the Workmen's Compensation Act, and the Court of Appeal, when the case came before them on appeal from the county court judge, though they felt they would have decided the case one way, felt bound by an earlier decision of the Court of Appeal to dismiss the appeal instead of allowing it, though there were many cases in the House of Lords which showed that the reasoning which led the Court of Appeal on an earlier occasion to decide the case as they did decide it was erroneous. Lord Wright said: "I feel no doubt that the decision of the "Court of Appeal was wrong, I can understand the difficulty "in which both the county court judge and the Court of Appeal "were placed in the present case. What a court should "do when faced with a decision of the Court of Appeal "manifestly inconsistent with the decisions of this House "is a problem of some difficulty in the doctrine of precedent. "I incline to think it should apply the law laid down by this "House and refuse to follow the erroneous decision."

If I may say so with respect, I feel exactly the same thing. If we find that the House of Lords has given a decision which is manifestly inconsistent with an earlier decision of a lower court, when a subsequent case comes before this court whether there has been an express overruling of the earlier case or not, we ought not to follow it. But in the present case, the House of Lords—one member at least—said that *Rex* v. *Deaville* (2) was wrongly decided; and when one comes to examine the speeches of the noble and learned Lords who took part in the debate in the House in *Milne* v. *Commissioner*

---

(1) [1940] A. C. 598.

(2) [1903] 1 K. B. 468.

of Police for City of London (1) it is quite obvious that none of them approved of the decision in *Rex* v. *Deaville* (2), but thought it was wrong. Therefore, whether or not there has been a formal overruling by all the members of the House or a majority of the House, or whether it be—as it is in this case—only one member expressly stating that *Rex* v. *Deaville* (2) was wrongly decided, and this court can see that all the noble and learned Lords who took part in the debate found that the reasoning was wrong, it follows that this court ought to follow the decision of their Lordships in the later case. In *Milne* v. *Commissioner of Police for the City of London* (1), the actual point that fell for decision was this: Could a bookmaker who used a telephone for the purpose of communication between his office and a particular club, taking bets and laying the odds by means of telephone messages, be said to be using the club for the purpose of betting? Their Lordships came to the conclusion that no offence in those circumstances had been committed because it was impossible to say that a person used a house merely because at one end of a telephone he telephoned to that house. They pointed out how absurd it would be to say that a man who telephoned from Liverpool to a house in London was using that house. He might send orders to that house for the purposes of business. He might order goods to be sent to Liverpool from London, or might arrange terms for sending goods from Liverpool to London, or New York to London, but nobody could say that a person in Liverpool telephoning to New York was using the house in New York because he telephoned to it or received messages from it.

That was no doubt the actual decision in *Milne* v. *Commissioner of Police for the City of London* (1), but each of their Lordships found it necessary in that case to go at length into what the word "user" meant and what amounted to user; and if it became necessary to go into that question, as it has been shown by their speeches that it did, I do not think it would be right to say—in fact I think it would be wrong to say—that the observations made on that matter were obiter; indeed I think they form part of the decision of the House.

Milne v. *Commissioner of Police for the City of London* (1) is, I think, conclusive of this case, and it disposes once and for all of many of the difficulties which Lord Halsbury's

(1) [1940] A. C. 1.

(2) [1903] 1 K. B. 648.

speech in *Powell* v. *Kempton Park Racecourse Co.* (1) caused. It was necessary to bring this question before the House of Lords at some time or another, in order to obtain a review of *Powell* v. *Kempton Park Racecourse Co.* (1) by the House of Lords. It was for that reason, no doubt, that the Attorney-General in that case gave his fiat for the case to be taken from this court to the House of Lords, because it is only the House of Lords which can explain another judgment of the House of Lords, and they did. They pointed out that Lord Halsbury's speech must not be taken to decide things which in their opinion it did not decide, although at first sight I can well understand, as their Lordships could, the difficulties caused by some of the expressions he used.

In that case, Lord Maugham L.C. said this (2): "My "Lords, I think we are driven to the conclusion that the owner "or other persons in control of the place, who open, keep "or use it for the first purpose mentioned in s. 1 of the Act, "are only doing something illegal if the 'user' is one which "involves that the betting with persons resorting thereto "is carried out by the owner, occupier or keeper, or by a "person using the place in a popular sense, who if not present "by himself or some agent or nominee, is permitted to "exercise, or in fact exercises, some de facto control or some "privilege or right over the place in question not being a "control, privilege or right possessed by the public at large. "Such a conclusion might be arrived at if the owner, occupier "or person using the place received a commission on the "bets, or if they allowed him to stand outside at an open window "and to call out the odds."

Then he deals with certain other illustrations. In those last words I think the noble and learned Lord was dealing with a case where a man could be said to be using the premises though he was not actually physically present. But I think it is equally clear that he means that a person uses a place for the purposes of this Act if he uses it in the popular sense and there is no more popular use of the word "use" than when it is said that a man "uses" a particular licensed house, meaning that he is frequently to be found there.

Lord Atkin put it much more emphatically (3). He explains *Powell* v. *Kempton Park Racecourse Co.* (1) where he says: "The present case does not raise the question whether the

---

(1) [1899] A. C. 143.
(2) [1940] A. C. 1, 18.
(3) Ibid. 25, 26, 27, 28.

C. C. A.

1949

REX
v.
PORTER.

"premises in question are a place within the meaning of the "Act, the debated question which is supposed to have been "decided in *Powell* v. *Kempton Park Racecourse Co.* (1)" —meaning that that was the real question they decided, whether the place there was a place within the meaning of the Act—" so in the public house cases I cannot see why, "if the bookmaker uses the bar of the public house for betting "in conditions which make it an offence if committed with "the permission of the licensee of the premises, exactly "similar user fails to be an offence if done without the "licensee's permission. The user appears to be the same "in both cases. I think therefore that *Rex* v. *Deaville* (2) "and the cases that followed it, were wrongly decided so far "as they laid down the test of permission by the occupier." With such an emphatic pronouncement as that by one of the noble and learned Lords, it would certainly be a strong thing for this court to say that that was merely obiter and we were not going to follow it.

Later he says: "My Lords, one would agree that if the "bookmaker stood at the door and made his bets verbally "with the members he would be using the premises for betting "with the members. It cannot matter whether it was during "the whole afternoon or less, and it cannot matter whether "he did so with the permission of the owner or not." Then he goes on to say that he disagrees with the idea that conversing on the telephone is analogous, and continues "I also think "that he"—that is the bookmaker—" can be said to be using "the premises if he has such a degree of control over them "that it can be said that the premises are a place where he "is carrying on his betting business. I do not think that he "need have any legal right of occupation; or that he need "be a partner with the actual occupier. Payments made "to the occupier or keeper or user of the premises either "by way of commission or otherwise for the privilege of "betting with the persons resorting to the premises, the "installation by the bookmaker on the premises of facilities "for betting with him, such as a private telephone or possibly "a private letter-box"—and so on—" might well afford "evidence on the question of fact whether the bookmaker "was in fact carrying on his business on the premises . . . .

"The question then to be considered by the tribunal of fact, "whether justices or jury, when a charge is made that a

(1) [1899] A. C. 143.

(2) [1903] 1 K. B. 468.

"bookmaker has used premises for the purpose of betting "with persons resorting thereto, is the same whether the "bookmaker has been actually present on the premises or "not. Has he in fact been carrying on his betting business "there, betting with persons resorting thereto?"

Lord Macmillan agreed with both the Lord Chancellor and Lord Atkin, and Lord Wright having made reference to Lord Halsbury's speech in *Powell* v. *Kempton Park Racecourse Co.* (1) said (2): "It is not clear, but I shall here assume, "that Lord Halsbury's speech represented the opinions "of the majority of the House. It may be that these words "would if taken in their full and literal significance at once "rule out Payne from the category of a person using the "club premises. But equally they would rule out other cases "where the offence has been held to have been committed, "rightly as I think, such as the case of the bookmaker who "used a slag heap on waste land as the place for his betting "business, or the workman in Scotland, who, without the "knowledge or permission of his employers, used the room "in which they were allowed to have their dinner to conduct "a betting business with his fellow workmen," and he quotes the decision in *Young* v. *Darrah* (3) and says: "I agree "with that decision. A like case would be that of a book-"maker who, without the permission of the publican or any "authorized agent of his carried on his betting business "in the bar of the public house. Permission is, I think, "immaterial in cases of this type, if in fact the place is used "for the prohibited purpose. The offence may be committed "by a licensee or by one who is not even a licensee and has "no permission from the occupier."

Lord Porter deals with *Powell's* case (1) in this way (4): "That case is primarily a decision as to what is a 'place,' "and determines that Tattersall's ring in which many book-"makers congregate, is not a place within the meaning of "the Act inasmuch as no bookmaker, though usually to be "found at a particular spot, takes his stand at an individual "place, nor has any particular spot been allotted to him. "He is free to bet on any part of the course and, though the "owners of the course know that he goes to Tattersall's ring, "yet they do not set aside any particular part of the course "for his use." Then he deals with *Hawke* v. *Dunn* (5) and

(1) [1899] A. C. 143.
(2) [1940] A. C. 41.
(3) 1929 S. C. (J.) 17.
(4) [1940] A. C. 49.
(5) [1897] 1 Q. B. 579.

says: "In neither case, however, was any de jure user proved. "The bookmaker had no more rights in the ring or elsewhere "on the course than any other member of the public; and "no de facto user was established because no particular "place was set aside for or used by any particular bookmaker."

Throughout the whole of his speech it is clear that he is of opinion that it is not necessary that there should be any de jure occupation of any particular place, and he, I think, like the other learned Lords, says that a distinction is to be drawn between a place like a ring on the racecourse and the words mentioned in the Act "any house, office, room, or "other place."

In these circumstances, I think that *Deaville's* case (1) can no longer be regarded as good law and must be taken to be overruled by *Milne* v. *Commissioner of Police for the City of London* (2) and it must be taken to be the law that if a bookmaker uses, that is to say, makes a habit of using the bar of a public house for the purpose of betting he is committing an offence against the Betting Act. It is not necessary that he should be found always to stand in exactly the same place. If he is in the saloon bar, that is a sufficient localization—to use the word used in these cases—to show that he is carrying on his business there. A man can carry on his business at one end of the room, just as well as at the other. It is sufficient localization if he is found in a room. A saloon bar for this purpose is a room, and I do not think any difficulty arises there. Nor is it necessary to prove, although no doubt it can very often easily be proved, that the licensee either knew that he was there, or permitted him to be there. If he is found there, carrying on the business of betting that is enough to constitute the offence. But that does not mean that a man who is not carrying on a bookmaker's business but merely takes a casual bet or makes a casual bet with another commits an offence, because that would be no evidence that he was carrying on the business of a betting house. But if the facts found in this case are proved it follows that an offence has been committed. That, in the opinion of this court, is the result of *Milne* v. *Commissioner of Police for the City of London* (2) and accordingly the appeal fails.

There is one other matter with which the court thinks that it should deal. The defendant in this case, as he was entitled to do, elected to go for trial. If he had not so elected

(1) [1903] 1 K. B. 468. (2) [1940] A. C. 1.

the case would have been dealt with by the magistrate. Then, if he desired to appeal to test the case, as we are told he did, the case would have been tested by means of a case, which would have been stated and come before the Divisional Court, and if it failed on the point of law the defendant would have had to pay the costs.

Under the new Criminal Justice Act, s. 38, sub-s. 5, it is provided that: "The Court of Criminal Appeal may, when "they dismiss an appeal or application for leave to appeal, "order the appellant or applicant as the case may be to pay "the whole or any part of the costs of the appeal." We think that in this case we ought to use that power because, as I have said, if he had not elected to go for trial, the way of testing this question of law would have been by way of case stated, which would have come before the Divisional Court (probably consisting of the same members) and if he had failed he would have had to pay the costs.

In these circumstances, when a bookmaker brings up a question of this sort which he thinks is important, and on which he wants and gets a decision, although it is a decision which is adverse to him, we think he ought to pay the costs. Accordingly, we dismiss the appeal and order him to pay the costs.

Appeal dismissed.

Solicitor for the appellant: *Registrar, Court of Criminal Appeal.*

Solicitor for the prosecution: *The Solicitor for Metropolitan Police.*

C. C. A.
1949
Mar. 24.
Lord Goddard C.J., and Humphreys and Birkett JJ.

REX *v.* BROOK.

Criminal law — Procedure—Felony — Fine—Imprisonment—Criminal Justice Act, 1948 (11 & 12 Geo. 6, *c.* 58), *s.* 13; *s.* 14, *sub-ss.* 1, 2; *s.* 15, *sub-s.* 5 (*b*).

The appellant had pleaded guilty at quarter sessions to a charge of theft. He was ordered to pay a stated sum as a fine and it was directed that he should be detained in custody until the fine was paid:

Held, that that order was not in compliance with s. 14, sub-s. 1, of the Criminal Justice Act, 1948, inasmuch as, if quarter sessions did not think fit to give the appellant time to pay the fine, the proper order was to impose a fine with a sentence, whereupon the sentence would begin to run at once, but the prisoner could obtain his discharge at any time under s. 15, sub-s. 5 (*b*), by paying the fine.

APPEAL against sentence.

The appellant, a ship's cook, pleaded guilty before the recorder of Grimsby, to a charge of theft, of ship's stores of the value of 10*s.* 9*d.* The recorder said, "that as it was "not a serious case he would not send the accused to prison," but imposed a fine upon him of 25*l.* and ordered him to pay 10*l.* towards the cost of the prosecution, and directed that the appellant remain in custody until it was paid. He (the recorder) would not permit the amount due to be paid by instalments and adjourned the quarter sessions sine die. After the appellant had been in prison for 25 days, he wrote to the recorder, who thereupon directed the governor of the gaol to release him on his entering into a recognizance to appear at the next quarter sessions. The appellant now appealed.

T. H. K. Berry, for the appellant, said that the order made by the recorder was not a proper one. He only had power to fine the appellant by s. 13 of the Act of 1948, and any order which he made must, therefore comply with s. 14 of the Act (1).

---

(1) Criminal Justice Act, 1948, s. 13: "Any court before which "an offender is convicted on "indictment of felony (not being "a felony the sentence for which "is fixed by law) shall have power "to fine the offender in lieu of or "in addition to dealing with him "in any other manner in which the "court has power to deal with "him."

Section 14, sub-s. 1: "Subject "to the provisions of this section, "where a fine is imposed by, or a "recognizance is forfeited before, "a court of assize or quarter "sessions, an order may be made "in accordance with the pro- "visions of this section—

"(*a*) allowing time for the pay- "ment of the amount of the fine "or the amount due under the "recognizance;

"(*b*) directing payment of the "said amount by instalments of "such amounts and on such dates "respectively as may be specified "in the order;

"(*c*) fixing a term of imprison- "ment which the person liable to "make the payment is to undergo "if any sum which he is liable to "pay is not duly paid or re- "covered;

"(*d*) in the case of a recogni- "zance discharging the recogni- "zance or reducing the amount "due thereunder:

"Provided that any term of "imprisonment fixed under this "subsection in default of pay- "ment of a fine shall not exceed "twelve months."

By sub-s. 2: "Any order under "this section may be made by the "court by which the fine is im-

C. C. A.

1949

REX
v.
BROOK.

The order was bad, first because no term of imprisonment was fixed, and secondly if it were it was not a term which did not exceed twelve months.

Elborne for the Crown.

LORD GODDARD C.J. delivered the judgment of the court: The appellant pleaded guilty at quarter sessions to a charge of theft. The learned recorder having heard the man's character, said: "Luckily for you it is not a serious matter. "I am not going to send you to prison at all. If it were "a serious case I would send you to penal servitude. I am "going to impose a fine on you, as I am entitled to do, of "25*l.* and you will pay 10*l.* towards the cost of the prosecution, "and you will remain in custody until it is paid." His counsel said, "I think that my client can raise 10*l.* tomorrow, if "not today, and I am going to ask." . . . The recorder, "I am not entering into any instalment plan." Counsel then said, "I suggest that the matter be considered under "s. 14 of the Criminal Justice Act, 1948 . . . ." The recorder: "If you came to me at the end of the day, and "said he had paid his fine and wanted a little time to find the "costs." Counsel: "The difficulty is that he lives in Leeds." The recorder: "Then the difficulty must be overcome, I am "not letting him free from this court."

"posed or before which the "recognizance is forfeited; and "(subject as hereinafter provided) "an order under this section providing for any such matters as "are mentioned in paragraph (*a*) "or paragraph (*b*) of the foregoing "subsection may be made . . .

"(*e*) where the fine was imposed "or the recognizance forfeited "by or before a court of quarter "sessions, by the chairman or any "deputy chairman of that court, "or by the recorder or any "deputy recorder, as the case may "be, upon application made in "writing to the clerk to the clerk "of the peace;

"and may amend any previous "order made under this section "so far as it provides for those "matters:

"Provided that no application "shall be made under paragraphs "(*a*) to (*c*) of this subsection after "the refusal of a previous application made thereunder."

Section 15, sub-s. 5 (*b*): "On "payment to the said officer or to "the governor of the prison of a "part of the fine or of the amount "due under the recognizance, the "total number of days in the "term of imprisonment shall be "reduced proportionately, that "is to say, by such number of "days as bears to the said total "number of days less one day "the proportion most nearly approximating to, without exceeding, the proportion which the "part paid bears to the amount "of the fine or the amount due "under the recognizance."

If the recorder thought he had any power to keep the man in custody for costs, he was wrong, and so the clerk of the peace seemed to think, because the clerk of the peace in drawing up the conviction drew it up in the form that he was to be kept in prison until the fine was paid but not until the costs were paid.

The rest of the history of this case is rather remarkable. It appears that the recorder adjourned the quarter sessions sine die, and on February 3, the prisoner having been in custody by that time for 25 days wrote to the recorder. Thereupon the recorder assumed the power—what power he had got, I do not know—of directing the governor of the gaol to release the prisoner on his entering into a recognizance to appear at the next quarter sessions.

Under the old practice, before 1948, with the single exception of manslaughter, the court had no power to impose a fine for felony, but for misdemeanor the court could always fine, and if that were done the courts constantly ordered the prisoner to remain in custody until the fine was paid. The prisoner being in custody, the court did not discharge him, they imposed a fine and said no more ; and that fine having been imposed, it was the duty of the prisoner to pay it if he could, and if he could not he was in the position of a debtor to the Crown. He would then have to petition the Crown to release him from prison and forgo the penalty. The Crown could do what it liked. Cases where the prisoner was in custody for non-payment of the fine were reviewed from time to time, and instructions would be given either by the Home Office or other appropriate authority to release the prisoner when it was thought he had been in prison long enough, probably with the consent of the Treasury. That would be done whether it was a fine or whether it was a recognizance.

Provisions were made under s. 2 of the Levy of Fines Act, 1822, for the clerk of the peace—and under the Queen's Remembrancer Act, 1859, the same procedure applied to assizes—to allow the prisoner to depart, and then, if the prisoner did not pay, the roll together with a writ of distringas and capias, was sent to the sheriff, and the sheriff would take the body of the prisoner and imprison him as a debtor to the Crown. Then the prisoner was released when the Crown saw fit to release him, and that has been done in many cases certainly in the experience of the members of the court. A fine has been imposed, perhaps a very substantial fine, and the man has been allowed to go so that he may possibly be able to raise the money, and then the sheriff took his body if he did not pay.

In this case, the recorder imposed a fine of 25*l.* on this seaman, and ordered him to remain in custody until it was paid. How he could assume a man remaining in custody could find 25*l.*, I do not know, but that is what he did. We have to consider what is the proper practice to be followed, and the course, as we think, laid down by the statute.

Under the Criminal Justice Act, 1948, the court for the first time has power to fine for felony, so it is all the more necessary to see that the procedure of the Act is properly followed. Courts, on indictment, can now fine for felonies, which previously they had not the power to do, so it is reasonable to suppose that there will be more cases of fines inflicted at assizes and quarter sessions than has hitherto been the case.

It is true that the words of s. 14 are "an order may be made," but it seems to the court that this section is inconsistent with the law that existed with regard to the payment or recovery of fines before the Act was passed, and we therefore, in accordance with the well-known principles of construction, construe it as a section which alters the law and now lays down a new procedure. It is desirable that the attention of quarter sessions should be called to this so that they may know what is the proper course to pursue in the future, and that when they are imposing a fine in lieu of sending a man to prison, or giving him the opportunity of paying a fine instead of going to prison, they should make one of the three orders which they can make under paragraphs (*a*), (*b*) or (*c*) of that section. They can say: "We fine you so much, "and you may have a month to pay it." They can say: "We fine you so much, and it is to be paid by three instal-"ments." Then they can go on and say: "You will be "imprisoned for such-and-such a time, not exceeding twelve "months, if any sum you are liable to pay is not duly paid." Accordingly, if the amount is not paid in accordance with the order made under clauses (*a*) or (*b*), proceedings can be taken and the person fined will have to undergo the sentence. In a case in which the court does not think it appropriate to give time or to allow the fine to be paid by instalments, they can pass the simple sentence, a fine of so much and in default so many months' imprisonment. In that case, as neither time nor instalments are allowed, the sentence will begin to run forthwith but the prisoner can obtain his discharge at any time by paying the fine as provided by s. 15 sub-s. 5 (*b*) of the Criminal Justice Act, 1948. Sub-section 2 of s. 14, in the opinion of the court, provides for the case in which the court, has made an order in the first instance, and then the defendant wants to ask the court in its discretion to vary the order. For instance, the court may have imposed, let us say, a substantial fine, a fine of 50*l.* to be paid in two instalments. The man finds he can pay one, and he cannot pay the second instalment. He will then run the risk of having his body taken and being imprisoned in default, but he can under this sub-section apply to the court and ask the court to vary the order and give him more time; or, instead of paying the second instalment in one sum, pay it in two or three sums as the case may be. Then it is expressly provided : "No application shall be made under paragraphs (*a*) to (*c*) of this sub-section after the refusal of a previous application made thereunder"; so that the person can only apply once, and if the court refuses the application, he will have to undergo the sentence of imprisonment passed in default. If a fine is imposed but no order is made as to imprisonment, on default the defendant cannot thereafter be taken and imprisoned, but the sheriff might be able to seize his goods to satisfy the fine.

Section 15 of the Act deals with the enrolment of fines or recognizances under s. 32 of the Queen's Remembrancer Act, 1859, that is, fines at assizes, or under s. 2 of the Levy of Fines Act, 1822, which deals with fines imposed by quarter sessions. I do not think it is necessary to refer to that section any further because that is really a machinery section concerned with making up what is commonly called the estreat roll.

Under the circumstances, we have come to the conclusion that the sentence imposed by the recorder was a wrong sentence. After the Criminal Justice Act, 1948, came into force he had no power to pass any such sentence. Although it has been said, and no doubt is true, that if a sentence which cannot stand in law had been passed, this court has power to alter the sentence and pass a sentence which could be lawfully passed, we think in this case the man has been sufficiently punished for what he did. We therefore quash the sentence and set aside the recognizance into which he has entered to appear before the recorder. He therefore goes free from today.

Appeal allowed.

Solicitor for the appellant: *Registrar, Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

L. F. J. McD.

C. A.
1949
Feb. 22.

Bucknill and Denning L.JJ. and Jenkins J.

LONG EATON CO-OPERATIVE SOCIETY LD. *v.* SMITH.

Agriculture—Minimum wage—Workmen employed in agriculture—Premises let to him by his employer, not under the terms of his employment—Rent above that prescribed for a cottage, being a benefit or advantage received under the terms of the employment—Agricultural Wages (Regulation) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 37), *s.* 1, *sub-ss.* 1 *and* 2, *s.* 7, *sub-ss.* 1, 2, 3, 9, 10 *and* 11, *s.* 8, *sub-s.* 1—*Agricultural Wages (Regulation) Amendment Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 17), *s.* 1—*Agricultural Wages (Regulation) Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 15), s. 2, *sub-s.* 1.

The Agricultural Wages (Regulation) Acts, 1924, 1940 and 1947, and the regulations made thereunder, prescribe a minimum wage for a worker employed in agriculture and also the rent at which a cottage, which is a benefit or advantage, may be reckoned as payment of wages in lieu of cash. Where the letting of the cottage is part of the terms of the employment, not more than such prescribed rent may be charged, whether the provisions for the amount of the wage in cash and for the housing accommodation are contained in one or two contracts. But it is otherwise if the letting is a transaction completely separate from and independent of the employment. If the observations of Lord Hewart C.J. and of Avory J. in *Williams* v. *Smith* [1934] 2 K. B. 158 were to the contrary, they went further than was necessary for the decision in that case and should not be followed.

A worker in agriculture entered that employment and two years later, at his own request was granted the tenancy of premises by his employer at a rent larger in amount than that prescribed for a cottage which was a benefit received by a worker under the terms of his employment under the Acts and regulations made thereunder. Throughout his employment, the worker was paid his wages in cash which, if no benefit or advantage was received by him under the terms of his employment, was the minimum wage prescribed under the Acts. The contract of tenancy provided that the tenant should vacate the premises let within four weeks of the worker ceasing to be employed by his landlord and employer.

Held that the letting of the premises to the worker by his employer was not a benefit or advantage received by the worker under the terms of his employment. Accordingly, the tenant was entitled to the minimum wage in cash and his landlord, who was his employer, was entitled to the rent agreed under the contract of tenancy.

APPEAL from the Long Eaton county court.

Smith was a worker employed in agriculture who, after two years employment with the Long Eaton Co-operative Society Ld., as such a worker, on November 13, 1943, at his own request became the tenant of a house owned by that society: No. 10, Co-operative Street, Long Eaton. For the preceding two years, he had lived in premises rented from a landlord other than the society. The agreement between Smith and the society was recorded as follows: "I, D. A. Smith "of 2, Harrington Street, Long Eaton, do hereby accept "the tenancy of the society's property situate at No. 10, "Co-operative Street, Long Eaton, on the condition that "should I cease under any cause to be employed by the society "as a farm labourer, I give up the tenancy of the said property "within four weeks of my being so employed by the society." From November 13, 1943, Smith remained the tenant at No. 10, Co-operative Street at a rent of, first 8*s.* 10*d.*, then 9*s.* 0*d.*, then 9*s.* 4*d.*, and lastly 9*s.* 6*d.* a week, these rents being the standard rents plus the permitted increases under the Rent Restriction Acts. The result of Smith's change of tenancy was that he paid slightly less rent. Throughout his employment, Smith was paid his wages in cash which if no benefit or advantage was received by him from his employers under the terms of his employment was that prescribed as his minimum wage by the Agricultural Wages (Regulation) Acts, 1924, 1940 and 1947 and the regulations made thereunder.

On January 31, 1948, the society gave Smith notice to terminate his employment with the society on February 7, 1948, and on February 14, 1948, they gave him the following notice to quit: "Under the terms of the agreement signed "by you on entering the society's employ, I hereby give you "four weeks' notice from Saturday, February 14, to vacate "the premises No. 10, Co-operative Street." Smith remained in occupation of the premises after the expiration of the notice to quit and the society sued him in the county court for recovery of possession of the premises under his agreement and s. 3 of, and the first schedule to, the Rent and Mortgage

Interest Restrictions (Amendment) Act, 1933, the premises being required for occupation by a new employee. By his defence, Smith claimed the protection of the Rent Restriction Acts and by a counterclaim alleged that under his tenancy of No. 10 he had been charged rent at a higher rent than the rate permitted by the Agricultural Wages (Regulations) Acts, 1924, 1940 and 1947, and the regulations made thereunder. He alleged, and it was not in dispute, that "the "value of a cottage or house occupied as a separate dwelling "by farm workers has throughout the relevant period been "a benefit or advantage valued" under the Agricultural Wages (Regulation) Act and the regulations made thereunder "at 6*s.* 0*d.* a week," while rent at a rate varying from 8*s.* 10*d.* to 9*s.* 6*d.* a week had been charged under the tenancy agreement in respect of No. 10, Co-operative Street. At the hearing it was conceded for Smith that the society was entitled to possession of the premises and His Honour Judge Willes dismissed the counterclaim since, on these facts, and in the circumstances of the case, the letting of No. 10, Co-operative Street, Long Eaton, to Smith at the contractual rent did not involve a breach of the legislation applicable to agricultural workers. Smith appealed against the dismissal of the counterclaim.

L. Blundell for the agricultural worker. Where the relationship of employer and employee exists and the employee is a worker in agriculture the Agricultural Wages (Regulation) Acts, 1924, 1940 and 1947 (1), and the regulations made

---

(1) Section 1 of the Agricultural Wages (Regulation) Act, 1924, provided for the establishment of agricultural wages committees for each county and an Agricultural Wages Board for England and Wales. By s. 3: "(1.) Where a "committee have fixed any minimum rate of wages or have "cancelled or varied any such "rate, they shall forthwith send "in the prescribed manner to "the Agricultural Wages Board "notification of their decision. "(2.) The Agricultural Wages "Board, on receipt of such notification, shall as soon as practicable make such order as "may be necessary for the purpose "of carrying out the decision of "the committee." That arrangement was modified, first, by the Defence Regulations, 1939, which made the Agricultural Wages Board the national authority for fixing minimum wages, and, secondly, by the Agricultural Wages (Regulation) Amendment Act, 1940, succeeded by the Agricultural Wages (Regulation) Act, 1947, which provided for the fixing of a national minimum wage by the Agricultural Wages Board.

By s. 7 of the Act of 1924: "(1.) Where any minimum rate "of wages has been made effective thereunder provide that any benefits or advantages (not being benefits or advantages prohibited by law) received by the worker from his employer, must be reckoned at the amount prescribed "by an order of the Agricultural "Wages Board under this Act, "any person who employs a worker "in agriculture shall, in cases "to which the minimum rate is "applicable, pay wages to the "worker at a rate not less than "the minimum rate, and, if he "fails to do so, shall be liable "on summary conviction in "respect of each offence to a fine "not exceeding twenty pounds and "to a fine not exceeding one pound "for each day on which the offence "is continued after conviction. "(2.) In any proceedings against "a person under this section it "shall lie with that person to "prove that he has paid wages "at not less than the minimum "rate. (3.) In any proceedings "against an employer under this "section the court shall, whether "there is a conviction or not, "order the employer to pay in "addition to the fine, if any, such "sum as may be found by the "court to represent the difference "between the amount which ought "at the minimum rate applicable "to have been paid to the worker "during the period of six months "immediately preceding the date "on which the information was "laid or the complaint was served "and the amount actually paid "to him during that period." Sub-section 9 of s. 7 saves the worker's right to recover any wages due to him by civil proceedings. By sub-s. 10: "Any "agreement for the payment of "wages in contravention of this "Act, or for abstaining to exercise "any right of enforcing the "payment of wages in accordance "with this Act, shall be void." By sub-s. 11: "Subject to any "definition under this Act of the "benefits or advantages which "may be reckoned as payment "of wages in lieu of cash and "the value at which they are to "be reckoned, and to any limitation or prohibition under this "Act of the reckoning of benefits "or advantages as payment of "wages in lieu of cash, the court "may, in any proceedings under "this Act, reckon as a payment "of wages such amount as in "the opinion of the court "represents the value of any "benefits or advantages (not "being benefits or advantages "prohibited by law) received by "a worker under the terms of "his employment." By s. 8: "(1.) The Minister shall, in "addition to any special power "to make regulations given to "him under this Act, have power "to make regulations for the "following purposes (*a*) for "requiring the wages committees "by order to define the benefits "or advantages (not being benefits "or advantages prohibited by "law) which may be reckoned as "payment of wages in lieu of "payment in cash and the value "at which they are to be reckoned, "and for enabling the committees "by order to limit or prohibit "the reckoning of benefits or "advantages as payment of wages "in lieu of cash, and for enabling "the committees on the application of any employer or "worker, to determine any "question which may arise as "to the value of any such benefits "or advantages, or generally as "to any contract of employment "so far as the application of this "Act thereto is concerned."

by the regulation for the county. When the benefit was a cottage with its garden the amount prescribed in the county of Derby was 6*s.* 0*d.* (less any charge made to the worker in respect of rates). Any larger rent was prohibited. The effect of the Act, as interpreted in *Williams* v. *Smith* (1), is that any larger rent is prohibited even if the cottage is let by the employer to the worker under an independent bargain. In that case Lord Hewart C.J. said: "No doubt it does seem hard that a man "shall not be allowed to spend his wages as he pleases, but "when one looks at the Act and the object of this Act, I "cannot help thinking that within certain limits its very "purpose is to prevent what has been called an independent "bargain." Avory J. said: "However attractive at first "sight, the argument of Mr. Monckton is that an agricultural "worker, who has once been paid the wages fixed under this "regulation ought to be allowed to spend his money as he "pleases, I have come to the conclusion that the effect of "the sections, particularly sub-ss. 10 and 11 of s. 7 and of "s. 8 of the Act of 1924 is to prohibit the agricultural worker "from spending more than a certain amount upon certain "matters which are described as benefits or advantages "under the Act." Tucker L.J. in *Bomford* v. *South Worcestershire Assessment Committee and Others* (2), a case dealing with the rateable value of an agricultural cottage said: "The argument is that, in any event, by reason of the

By s. 2 of the Agricultural Wages (Regulation) Act, 1947: "(1.) The Agricultural Wages "Board shall have power, for "each county for which an "agricultural wages committee is "established under the principal "Act, by order made in accordance "with the provisions of the First "Schedule to this Act (*a*) to "define the benefits or advantages "(not being benefits or advantages "prohibited by law) which for "the purposes of any minimum "rate of wages fixed under the "principal Act may be reckoned "as payment of wages in lieu of "payment in cash; (*b*) to determine the value at which, for the "purposes aforesaid, such benefits "or advantages may be so "reckoned; (*c*) to limit or prohibit "the reckoning for the purposes "aforesaid of benefits or advantages as payment of wages in "lieu of payment in cash; (*d*) to "define, for the purposes of any "differential rate of wages for "overtime fixed under the principal Act, the employment which "is to be treated as overtime "employment."

The relevant regulation for the county of Derby determined the value at which the benefit or advantage of a cottage and garden should be reckoned as at 6*s.* 0*d.* a week (less any charge made to the worker in respect of rates).

(1) [1934] 2 K. B. 158.

(2) [1947] K. B. 575.

"operation of the Agricultural Wages (Regulation) Acts, 1924 "and 1940, and the orders made thereunder, the value, for the "purposes of rating is fixed irretrievably, once and for all "at 3*s*. 0*d*. a week, because that sum has been fixed as the "maximum which may be deducted from the wages fixed "by the statute as payable to the farm workers. Furthermore, "it has been decided by the Divisional Court in *Williams* v. "*Smith* (1), the correctness of which both sides accept, that "if the cottages are let, they cannot be let to the farm worker "at a rent in excess of 3*s*. 0*d*. It is said to follow from that, "as a matter of law, that there is only one figure which can "be taken as the gross value, namely, the figure arrived "on the basis of 3*s*. 0*d*. a week." From that passage two propositions emerge: (1.) that if cottages are let, they cannot be let to the farm workers at a rent in excess of, in that case, 3*s*. 0*d*. a week; and (2.) that both sides accepted the correctness of this decision in *Williams* v. *Smith* (1) from which Tucker L.J. does not suggest any dissent by the Court of Appeal.

The law, therefore, is that an employer in the county of Derby can never let to a worker, employed by him in agriculture, premises at a higher rent than 6*s*. 0*d*. a week. If it were not so, the provision made by these Acts for a minimum wage would be defeated, since the employer and landlord could charge what he would for rent within the limits of Rent Restriction Acts and thus secure a net payment to the worker employed in agriculture of less than the minimum wage.

If it is suggested that the contract of letting these premises was not a benefit received by the worker "under the terms "of his employment," within the meaning of sub-s. 11 of s. 7 of the Act of 1924, the answer is twofold. First within the meaning of these Acts, the letting of any cottage by an employer to his employee, employed in agriculture is received by the employee as a benefit "under the terms of his employ-"ment," since what is being considered is cash plus benefits received. Secondly, even if that were not so, provision here was made by the contract of tenancy that the worker accepted the tenancy "on the condition that should I cease, under "any cause, to be employed by the society as a farm labourer, "I give up the tenancy of the said property within four "weeks of my being so employed by the society."

V. Argyle for the employers. This letting was not a benefit

(1) [1934] 2 K. B. 158.

or advantage received by the worker in agriculture "under "the terms of his employment" within the meaning of sub-s. 11 of s. 7 of the Act of 1924. The letting took place two years after he had been first employed by these employers and the tenancy was granted by the employers to the worker at his request, since the rent of the premises was less than that of the premises he had previously occupied. The letting, not only in form but, in fact, had nothing to do with the terms of employment between the employers and this worker in agriculture.

The decision, no doubt, in *Williams* v. *Smith* (1) can be justified, but not the observations of Lord Hewart C.J. and of Avory J., if they mean that an employer can in no circumstances let to a person whom he employs in agriculture premises at a greater rent than the amount prescribed for a benefit or advantage received by him "under the terms of "his employment," in this case, 6*s*. 0*d*. a week. If a worker employed in agriculture was the tenant of the village shopkeeper at 9*s*. 0*d*. a week rent, and that worker's employers bought the premises let to the worker, would the employer and landlord have to reduce the rent to 6*s*. 0*d*. a week? If the tenant of a farmer who paid 15*s*. 0*d*. a week rent for his premises and sub-let a part of them, subsequently entered the employment of the farmer as a worker in agriculture, would the farmer have to reduce the rent to 6*s*. 0*d*. a week?

L. Blundell replied.

Bucknill L.J. I will ask Jenkins J. to deliver the first and Denning L.J. the second judgment.

Jenkins J. On the facts of this case it appears that the appellant Smith, for the first two years of his employment found his own living accommodation. The contract of service was simply a contract to employ him as a farm labourer at so much a week in cash, and it is not disputed that the amount of the wages paid to him week by week was at all times in accordance with the minimum wage for the time being in force. Two years after he was engaged, came the letting to him of No. 10, Co-operative Street on his own application. Therefore his agricultural employer became his landlord, and consequently the rent reserved by the tenancy agreement was duly paid by him week by week to his employer in the capacity of landlord. Those are the facts to which one must apply the relevant legislation and regulations. As I have said, the letting to Smith of No. 10 was at his own request, and the rent was no more than the rent properly chargeable under the Rent Restriction Acts. I think I am right in saying also that in fact the rent reserved for No. 10 represented some small saving to him over the rent which he previously had to pay for the accommodation he found for himself elsewhere.

---

(1) [1934] 2 K. B. 158.

[His Lordship then read s. 3, sub-ss. 1 and 2, s. 7, sub-ss. 1, 2, 3, 9, 10 and 11, s. 8, sub-s. 1 (*a*) of the Agricultural Wages (Regulation) Act, 1924, and s. 2 of the Agricultural Wages (Regulation) Act, 1947, and mentioned s. 1 of the Agricultural Wages (Regulation) Amendment Act, 1940, by which it became the duty of the Agricultural Wages Board to fix a national minimum wage. He continued :]

A large number of regulations were made under this legislation. For the present purpose I think it is only necessary for me to refer to the particular one which Mr. Blundell for the appellant showed us as typical, that is No. 1345 made in relation to the county of Derby. This order sets out in a schedule the minimum wages for workers of twenty-one years of age and over, and for workers of varying ages less than that. Also in the schedule in para. 10 there is a provision about benefits and advantages : " For the purpose of the application " of the above minimum rates of wages the Derbyshire " Agricultural Wages Committee have by order dated " December 12, 1941, defined the following as the benefits or " advantages which may be reckoned as payment of wages " in lieu of payment in cash and the values at which they are " to be so reckoned, and prohibited the reckoning of any " other benefit or advantage as payment of wages in lieu " of payment in cash : 1. Benefits or Advantages : (*a*) New " milk. (*b*) Board (including any meals, but not including " intoxicating drink). (*c*) Lodging provided by the employer, " whether in his own house or otherwise, except in any case " in which the Agricultural Wages Committee may determine " that the lodging accommodation provided is so defective " as to be injurious to health. (*d*) Cottage including any " garden provided with the cottage except where the cottage " is one in regard to which the Medical Officer of Health has " reported that it is in a state so dangerous or injurious to " health as to be unfit for human habitation." In sub-cl. 2

of cl. 10 the material provision is: "(*d*) Cottage, 6*s*. 0*d*. per "week (less any charge made to the worker in respect of rates) "provided that—in the case of a cottage with regard to "which the Agricultural Wages Committee, on an application "by or on behalf of a worker, have certified that by reason "of inadequate accommodation, want of repair or sanitation "or lack of water supply, the value of such cottage is less "than 6*s*. 0*d*. per week, the value shall be such sum less than "6*s*. 0*d*. per week as the committee shall determine (less "any charge made to the worker in respect of rates)." Those are, I think, all the relevant statutory provisions.

The question for this court is whether the learned county court judge was right in holding, as he did, that on the facts of this case no breach of the Acts and regulations had been made out. In order to succeed Smith must show that he has been paid something other than the full minimum wage made up either of cash or of benefits or advantages permitted to be reckoned as payment of wages in lieu of cash, and reckoned at values not exceeding those authorized by the regulations, namely, so far as a cottage is concerned, 6*s*. 0*d*. per week.

It is contended by Mr. Blundell that the Acts and regulations have this effect: They not only prohibit the payment to an agricultural worker of a sum less than the minimum wage in cash and the giving to him of a benefit or advantage making the wage up to the minimum wage, but reckoned for that purpose at a figure in excess of the permitted value; but also prohibit in all circumstances, wherever the relation of employer and employee exists between an employer and an agricultural worker, any transaction of letting of lodgings, or provision of milk, or whatever it may be, which involves the payment by the agricultural worker to his employer of a greater sum, or a greater price, than the permitted figures which are given in the regulations as the value at which those matters may be reckoned as payment of wages in lieu of payment in cash. So in this case according to Mr. Blundell's argument, although in origin the contract here was a contract of service into which no question of the provision of a cottage entered at all—it was simply a contract of service for cash, and for cash which amounted to the minimum wage—yet, notwithstanding that, because Smith, whilst still in the employment of the Co-operative Society, although it was as long as two years later, came to them and asked to be accepted as tenant of No. 10, Co-operative Street, the Acts and the regulations have been infringed by the Co-operative Society, saying in effect: "If you want No. 10, Co-operative Street, "you must pay the ordinary rent for it that any other tenant "would be expected to pay."

For my part, notwithstanding the persuasive way in which Mr. Blundell put the argument, I am unable to place such a construction upon the Acts. What the Acts and the regulations prohibit is the payment of wages other than in cash, with the exception that benefits or advantages of certain kinds can be taken as equivalent to payment in cash up to, but not exceeding, a specified value. That is what the Acts and regulations seem to me to provide. The Acts and regulations clearly have not in any literal sense been infringed by anything which was done in this case. Smith was paid the full minimum wage in cash. Nothing was credited to the employer as a payment of wages otherwise than in cash in respect of any accommodation or any other privilege or advantage whatsoever. After Smith had received his wages paid in full in cash, he paid, amongst other things, his rent. It so happens, in the circumstances which I have stated, that the landlord who received the rent was also his employer, but that circumstance did not alter the fact, so far as I can see, that Smith had received the whole of his wages in cash.

Mr. Blundell contends that, unless his argument prevails, the whole of this legislation is rendered ineffective because all that is necessary in order to avoid its effect is for an employer to say to his workman: "I will pay you the "minimum wage of so much, and I can let you have a cottage "at so much rent." It follows, he says, unless his view is right, that such a transaction would not infringe the Acts or the regulations. That, if I may say so, with respect, is really something of a travesty of what seems to me to be the true position. In my judgment the true position is this. Each case must be looked at on its own facts, and the question in each case must be: in this case is the employee receiving the full amount of his wages in cash, or in cash, plus some permitted benefits or advantages charged for at no more than the permitted figure? That is the question, and if, in a particular case, it is found that the contract of service was in substance a contract for so much cash, plus a house or a cottage, then if the amount of the rent attributed to the cottage is higher than the permitted amount, it does not

C. A.

1949

LONG EATON CO-OPERATIVE SOCIETY, LD. *v.* SMITH.

Jenkins J.

matter in the slightest degree whether the form of the contract was 2*l.* a week cash, plus a cottage counted at 1*l.* a week, or 3*l.* a week cash "and you can have this cottage for which "you will pay 1*l.* a week." In either of those two examples the substance of the matter would have been that there would be included as part of the wages a cottage reckoned for the purpose at more than the permitted figure. That does not mean, in my judgment, that it is never possible for an employee, as a genuinely separate transaction, to rent a house or cottage from his employer at whatever figure may be agreed between them. Whether it is a genuinely separate and distinct transaction or not must be a question of fact in each particular case. It would be idle, and I think not helpful, to attempt to give an exhaustive definition of the facts which would fall on one side of the line or the other. I am satisfied that on the facts of this case the county court judge was right in holding that Smith had failed to make out his case of infringement of the Acts and regulations, and rightly dismissed the counterclaim.

We have been very strongly pressed with the decision of the Divisional Court in the case of *Williams* v. *Smith* (1), where the headnote is in these terms: "A worker in "agriculture under his contract of service received his proper "statutory wages in full. Under a separate agreement with "his employer he paid back to his employer 1*l.* each week "for board and lodging with him, 15*s.* 0*d.* being the maximum "amount fixed by statutory order under s. 8, sub-s. 1 (*a*) "of the Agricultural Wages (Regulation) Act, 1924, as the "value of that benefit or advantage which could be reckoned "as payment of wages instead of payment thereof in cash. "The worker was free to lodge elsewhere, and the employer "would have preferred him to do so: Held, that as the "employer had allowed the worker to board and lodge with "him he might not receive from him more than 15*s.* 0*d.* per "week in respect thereof, although in form the contract "to pay more was distinct from the contract of service." Looking at the facts of that case, it seems to be reasonably plain that the arrangement under which the worker was to lodge with the employer at 1*l.* a week was part of his contract of service. It is true that it was a separate agreement, but it was entered into at the time he was engaged. He was given the option of taking 1*l.* 11*s.* 0*d.* and finding himself lodgings elsewhere in the village, or taking 1*l*. 11*s*. 0*d*., lodging with his employer and paying to him 1*l*. a week. He opted for the latter arrangement, and in the result, as it seems to me, the upshot of the true bargain that he made was that, as part of his contract of service, he was given board and lodging by the employer. That being so, on the facts, it seems to me it is a case where a benefit or advantage was reckoned in the wages at a figure higher than the permitted figure, and, none the less so, because it was done by the employer paying the full wage in cash to the employee, and the employee paying 1*l*. of it back to the employer's wife for his board and lodging. Accordingly, I am in complete agreement with the conclusions arrived at by the Divisional Court in that particular case. It does seem to me, however, that some of the observations which fell from their Lordships in the judgment went further than was necessary for the decision of the particular case, and if any of those observations properly construed involve the view that in a case like that now before the court the house ought to be considered as a benefit or advantage included in the wages in lieu of cash at a figure higher than the permitted figure, then, in my judgment, those observations should not be followed as representing the law. But as the decision on the facts of the case stands, I find nothing in it whatever to quarrel with.

---

(1) [1934] 2 K. B. 158.

The other authority to which we were referred was a rating case of *Bomford* v. *South Worcestershire Assessment Committee and Others* (1). It was, as I have said, a rating case, and, therefore, dealt with a very different subject-matter. But it did concern the rateable value of an agricultural cottage. The argument for the owner was to the effect that, having regard to the Agricultural Wages (Regulation) Acts, 1924 and 1940, and to the construction placed on those Acts in the case of *Williams* v. *Smith* (2), it was impossible for him ever in any circumstances to get a greater rent than 3*s*. 0*d*. a week for the cottage in question which presumably was a cottage which nobody would occupy except an agricultural worker. In the result the argument that 3*s*. 0*d*. was an absolute limit was rejected by the court mainly on the ground, I think, that some other farmer might be so much in need of the accommodation for some agricultural worker of his that he would have been prepared to pay more than 3*s*. 0*d*. a week in order that he might provide accommodation for his worker bearing the additional amount he had to pay out of his own pocket. Be that as it may, the passage which I think is the only one which has any bearing on the present case occurs in the judgment of Tucker L.J. (1), where he says: "The argument is that, "in any event, by reason of the operation of the Agricultural "Wages (Regulation) Acts, 1924 and 1940, and the orders "made thereunder, the value, for the purposes of rating, "is fixed irretrievably, once and for all, at 3*s.* 0*d.* a week, "because that sum has been fixed as the maximum which may "be deducted from the wages, fixed by the statute as payable "to the farm workers. Furthermore, it has been decided "by the Divisional Court in *Williams* v. *Smith* (2), the "correctness of which both sides accept, that, if the cottages "are let, they cannot be let to the farm worker at a rent in "excess of 3*s.* 0*d.* It is said to follow from that, as a matter "of law, that there is only one figure which can be taken "as the gross value, namely, the figure arrived at on the basis "of 3*s.* 0*d.* a week." For my part I cannot regard that reference to *Williams* v. *Smith* (2) as really adding anything to its value as a decision of the Divisional Court. Tucker L.J. it will be observed, in quoting the case, said: "The correctness "of which both sides accept," so the question whether *Williams* v. *Smith* (2) was rightly decided or not was not in issue in *Bomford* v. *South Worcestershire Assessment Committee and Others* (3). I cannot, therefore, for my part, regard the latter case as adding anything to the former.

---

(1) [1947] K. B. 575.

(2) [1934] 2 K. B. 158.

For the reasons which I have endeavoured to state, in my judgment the county court judge was right in his conclusion in the present case, and the appeal should accordingly be dismissed.

DENNING L.J. By statute agricultural workers have to be paid at least a specified wage. It is a criminal offence to pay a wage below the minimum. The legislature realized that wages might be paid in cash or in kind. For instance, the worker might in addition to cash, receive benefits and advantages (not being benefits or advantages prohibited by law) such as the provision of a cottage or milk, or board and lodging. The legislature, therefore, said that the court had to reckon the value of the additional benefits and advantages, translate them into cash, add that to the cash payment,

(1) [1947] K. B. 575, 582.
(2) [1934] 2 K. B. 158.
(3) [1947] K. B. 575.

and then see whether or not the minimum was paid. In order to relieve the courts of the task in every case of assessing the value of those benefits and advantages, power was given to county Agricultural committees—now to the Agricultural Wages Board—to specify what value was to be put upon the benefits and advantages. Accordingly regulations have been issued giving figures for the more usual benefits, such as a cottage or milk, or board and lodging. If a free cottage is given, the value is to be taken at 6*s.* 0*d.* a week. If milk is provided it is to be taken at the current wholesale price and so forth. Those provisions are intended to translate into cash the value of benefits in kind so as to see whether the minimum has been paid or not.

All so far is straightforward, but the legislature did not specifically deal with this point: Supposing that at the time of the man's employment arrangements are made for the farmer to pay him the minimum sum in cash, but then, by a transaction at or about the same time, the farmer agrees to give the man certain benefits in return for a payment by the man in cash over and above the sums specified by the Wages Board for those benefits. If the two transactions were to be regarded in law as separate and distinct from one another, it would mean that any employer could evade the Act by a simple expedient: the excessive sum charged for the benefits and advantages would be an indirect method of paying less than the minimum wage. What the farmer paid with one hand he would take back with the other. Faced with a case of that kind, the court in *Williams* v. *Smith* (1), said: "We must look at the reality "and not at the form." If in reality the man is receiving less than the minimum wage, the employer is guilty of an offence.

The key for deciding the answer to this question is to be found in sub-s. 11 of s. 7 of the Agricultural Wages (Regulation) Act, 1924. That shows that the court has to see what are "the terms of the employment." "The court "may in any proceedings under this Act, reckon as a payment "of wages such amount as in the opinion of the court "represents the value of any benefits or advantages (not "being benefits or advantages prohibited by law) received "by a worker under the terms of his employment." The employer cannot evade the Act by making, in point of form, two separate contracts. The court must look at the whole terms of the employment and see, taking them as a whole,

(1) [1934] 2 K. B. 158.

whether or not the minimum is paid. In *Williams* v. *Smith* (1) the terms of the employment were that the worker was to receive the minimum wage of 31*s.* 0*d.* in cash, and pay 1*l.* for his board and lodging, whereas the prescribed allowance was only 15*s.* 0*d.* Taking the terms of employment as a whole, therefore, the extra 5*s.* 0*d.* was in effect a deduction from the minimum wage. So the court held that an offence had been committed. The governing words in sub-s. 11 of s. 7 are, in my opinion, "under the terms of his employment." They may be found in one document or in two, in one contract or in two contracts. Whenever found, the whole must be looked at to see whether or not the minimum wage prescribed by the Act has been paid.

This is a case which is altogether different. The letting of this house was not one of the terms of the employment. It was not part and parcel of the transaction as in *Williams* v. *Smith* (1). It was a completely separate and independent transaction. Such a transaction is not touched by the Act at all. This man was throughout receiving his full minimum wage. Two years after he entered the employment, the employer let him this house. He paid less rent than he had been paying for the house which he had previously occupied; and he only paid the rent allowed by the Rent Restriction Acts. In those circumstances it seems to me to be wrong to say that any offence against the Act was committed. The argument here for the worker employed in agriculture must go so far as to say that there is a prohibition against any employer letting to such a worker a house or cottage at more than 6*s.* 0*d.* a week. There is no such prohibition in the Act, and there is nothing in the Act which enables any committee or board to make any such prohibition. If the words of Avory J. in *Williams* v. *Smith* (1) go as far as that, I cannot agree with them.

Instances have been put in the course of argument of the absurd results which would follow from the contention put before us to-day. It would mean that, although a worker took a house at a fair rent from a separate landlord, a third person, and then the farmer employing that worker took an assignment of the reversion of the tenancy, that then he would have to reduce the rent. It would also mean that a tenant who took a good house from a farmer which he could sub-let at considerable profit—he might have taken it long before

(1) [1934] 2 K. B. 158.

his employment started—would, nevertheless, on entering the farmer's employment, be able to say he ought to be only charged 6s. od. for it. In my judgment there is nothing in the Acts which compels us to reach any such absurd conclusions. Whenever there is a separate and independent transaction which does not form part of the terms of the employment, the Acts do not affect it. This is one of those cases.

I agree that the appeal should be dismissed.

Bucknill L.J. I agree.

Appeal dismissed.

Solicitors for the agricultural worker: *Vizard, Oldham, Crowder and Cash for Bartlett, Young, Murphy and Walters, Loughborough.*

Solicitors for the employers: *Savery, Stephens and Nutt for R. A. Young, Nottingham.*

C. G. M.

BALL AND ANOTHER v. LONDON COUNTY COUNCIL.

C. A.
1949
Apr. 26, 27, 28.

Tucker, Evershed and Singleton L.JJ.

Landlord and tenant—Personal injuries sustained by tenant's daughter—Negligence—Domestic boiler installed by landlord in kitchen—No safety valve fitted to boiler—Explosion of boiler during severe weather—Water pipes frozen up—Fire lit by daughter of tenant—Whether boiler a "noxious and dangerous thing."

The defendants, having acquired the reversion of a demise of premises, by oral agreement, to the first plaintiff, Mrs. B., in 1940 or 1942, with the consent of the tenant, installed in the kitchen an "Ideal" boiler, in place of an old boiler, and connected it with the water system. No safety valve was fitted to the boiler. In February, 1947, during the exceptionally severe weather at that time experienced in this country, the water system throughout the premises became frozen up, and the second plaintiff, the daughter of Mrs. B., who resided with her mother, having lit a fire in the fire-box of the boiler the accumulating steam, being unable to escape, caused a violent explosion which wrecked the kitchen and caused very serious injuries to the second plaintiff.

Held, reversing the decision of Stable J., that the boiler without a safety valve was not in law "a noxious and dangerous thing" and therefore the defendants owed no duty to the second plaintiff, with whom they were not in any contractual relationship, and she was not entitled to recover damages from them.

Decision in *Malone* v. *Laskey* [1907] 2 K. B. 141, applied.

C. A.

1949

BALL
v.
LONDON
COUNTY
COUNCIL.

APPEAL from Stable J.

The first plaintiff, Mrs. Emma Sophia Ball, was the tenant under an oral agreement of the premises No. 47, Woodberry Avenue, Manor House, London, N.4, and the London County Council were the landlords of the premises, having acquired the reversion in or about the year 1938. In 1940 or 1942, without any contractual or statutory obligations so to do, the council entered upon the premises with the consent of the tenant and installed, in substitution for an old boiler, an "Ideal" boiler and connected it to the water system of the house for the purpose of heating water. The said boiler was not fitted with a safety valve, either attached to the boiler itself or to an appropriate part of the water system. At about 10.30 a.m. on February 23, 1947, the second plaintiff, Miss Grace Maria Ball, daughter of, and then resident with, the first plaintiff, kindled a coke fire in the fire box of the boiler. The weather was at the time unusually severe, and the boiler fire having been let out for a day or two, apparently because of shortage of fuel, the water system had become frozen up. Consequently the steam which the fire caused to accumulate, being unable to escape, caused a violent explosion, which not only wrecked the kitchen but severely injured the second plaintiff. The plaintiffs claimed damages, alleging negligence and breach of duty on the part of the defendant council.

The action came on for hearing before Stable J. and a special jury on November 2, 1948, but at the conclusion of the evidence the jury was by agreement of the parties dispensed with and the questions, both of fact and law, were left to the learned judge, who, having found that the boiler as installed was dangerous; that its condition was, or by the exercise of reasonable skill and care would have been, known to the defendants; and that Miss Ball in lighting the boiler was not acting in a way in which a reasonable person would not have acted, awarded Mrs. Ball 5*l.* 5*s.* 0*d.* and Miss Ball 888*l.* 18*s.* 2*d.*, including 239*l.* 17*s.* 5*d.* for hospital expenses. Applying the words of Greer L.J. in *Bottomley* v. *Bannister* (1), he was of opinion that the duty of the defendants to Miss Ball arose as a matter of tort and not of contract.

The defendants appealed.

Russell Vick K.C. and *R. Bowen* for defendants. This appeal concerns only the award to the daughter. Though we do not admit liability to Mrs. Ball, the tenant, the amount involved is so small that it is not proposed to trouble the court with it. Briefly stated, the contentions for the defendants are that there was no privity between them and the daughter, who was merely on the premises as the licensee of her mother; that the defendants owed no duty to the daughter; and that even if they did owe a duty there was contributory negligence on the part of the daughter which really was the sole cause of her injuries.

---

(1) [1932] 1 K. B. 458, 478.

[TUCKER L.J. She would be in exactly the same position as a person walking up the street who was injured by the explosion.]

Exactly the same. On the evidence it is obvious that the plaintiff, Miss Ball, knew that the boiler was frozen up and that she lit the fire to thaw the ice in the pipes and clear them. There was no negligence on the part of the defendants. Their duty was to act reasonably and the question is whether when a small boiler of this character is installed the person installing it must contemplate such a solid freezing of the pipes as in fact occurred. The defendants are not insurers and owe no duty other than to take reasonable care. *Malone* v. *Laskey* (1) is on all fours with the present case and, it is submitted, the decision there covers this case. In *Cavalier and Wife* v. *Pope* (2), it was held that the female plaintiff had no cause of action in respect of injuries suffered by her because she was not a party to the contract. *Donoghue* v. *Stevenson* (3) does not apply to house property.

[*Otto* v. *Bolton and Norris* (4); *Bottomley* v. *Bannister* (5); *Davis* v. *Foots* (6); *Parry* v. *Smith* (7); and *Travers* v. *Gloucester Corporation* (8) referred to.]

Sutton K.C. and *Morgan Blake* for plaintiffs. As this is an action in tort for negligence the plaintiff has to establish: (1.) that a duty was owed to her. That is a question of law, and may be a matter of general importance; (2.) that there has been a breach of that duty, and that is purely a question of fact to be determined on the evidence; (3.) were the injuries suffered by the plaintiff, the daughter, due to the breach of duty, and if this court finds that they were it will have no difficulty in upholding the finding of the learned judge. It is conceded at once that no person can complain of a breach of contract, as giving him a cause of action, if he was not a party to that contract. *Malone* v. *Laskey* (1) is the implication of that branch of the law. On the other hand a person who contracts to do a thing may take upon himself to do something where the law imposes on him a duty, and it does not follow that because one person might sue him for breach of contract anybody else is debarred from suing him in tort. If a father employs a surgeon to attend his injured son, and the surgeon is negligent, the infant has cause of action based upon breach of the duty which the law imposes on people who undertake things of that kind. The law imposes a duty to take care with regard to a person not a party to the contract. It cannot be challenged in this court that if a landlord makes a demise he owes no duty to the tenant to see that the premises are in a good condition. In other words, it is a case of caveat lessee. There is no exception to that rule, even where the defects are due to the action of the person who makes the demise.

---

(1) [1907] 2 K. B. 141.
(2) [1906] A. C. 428.
(3) [1932] A. C. 562.
(4) [1936] 2 K. B. 46.
(5) [1932] 1 K. B. 458, 478.
(6) [1940] 1 K. B. 116, 123.
(7) (1879) 4 C. P. D. 325.
(8) [1947] K. B. 71.

[TUCKER L.J. A fortiori he owes no duty to anybody who comes into the premises after the demise.]

The landlord owes no duty to anybody under the demise. It is submitted that this court is now being asked to extend that rule and to say that if the landlord *after* the demise takes upon himself to enter the premises and put in a boiler which blows up he may do so with impunity.

[EVERSHED L.J. Supposing the installers of the boiler had been not the landlord but say Smith & Co., who may or may not have charged for the work, I assume they would be liable to the occupier of the premises, but would they be liable to a guest ?]

When a person installs something which is dangerous he is under a duty, not only to the person with whom he has contracted, not only to the person who has asked him to install the thing, but to everybody, whether under contract or not, to do the thing carefully or to warn people who may come in contact with it. The duty is entirely independent of contract. As to the principle applicable to the installation and management of dangerous things, see *Parry* v. *Smith* (2), where a gas meter having been taken away for repair it was replaced by a flexible tube and a servant of the occupier of

(1) [1907] 2 K. B. 141. (2) 4 C. P. D. 325.

the premises was injured through a leakage of gas, and was awarded damages. The action was founded not on contract but on breach of duty in dealing with a highly dangerous thing. No privity was needed, and the decision would have been the same if the defendant had been the landlord. In *Dominion Natural Gas Co.* v. *Collins and Perkins* (1), it was again recognized that there was this duty imposed on the installers of things which are dangerous. This decision was long before *Donoghue* v. *Stevenson* (2). It does not necessarily follow that because a landlord is immune in letting premises in a dangerous condition that he is also immune in respect of things done after the demise. In *Cheeter* v. *Cater* (3) the plaintiff failed to show that yew trees on an adjoining estate were not, at the date of the demise, overhanging his land so as to be within reach of his mare. Had he done so the judgment would have been in his favour. The case would then have been treated as between adjoining owners of land rather than as between landlord and tenant. This court is asked to say, on the authority of *Parry* v. *Smith* (4) and *Dominion Natural Gas Co.* v. *Collins and Perkins* (1) that it is no part of the law of England that a landlord, after a demise of premises, can do things with impunity which anyone not a landlord cannot do. What is or is not a dangerous thing is a matter of law, but it is submitted that looking at it from the point of view of common sense, the installation of a thing in which something so powerful as steam is generated, in such a way that there is no provision for enabling the steam to escape, with the result that an explosion necessarily occurs, comes within the rule relating to dangerous things.

[TUCKER L.J. I do not think the finding of a jury would decide whether it was a dangerous thing.]

No, it is always a question of law for the court to decide The learned judge has found as a fact that this boiler, installed without a safety valve, was a defective and dangerous thing and that because of the risk the defendants owed a duty not only to the other party to the contract but to those who had occasion to use the boiler for the purpose for which it was installed. Freezing was one of the very things against the danger of which a safety valve would have been a precaution. The learned judge acted upon the evidence, as he was entitled to do and it is submitted that he came to a right conclusion

---

(1) [1909] A. C. 640.

(2) [1932] A. C. 596.

(3) [1918] 1 K. B. 247.

(4) C. P. D. 325.

Russell Vick K.C. in reply. It is impossible to distinguish this case from *Malone* v. *Laskey* (1). In cases down to 1871 the common law courts affirmatively laid it down that yew trees were dangerous, but steam has so far never been held to be a dangerous thing. The evidence has established that there is no hard and fast rule with regard to fitting safety valves on these small domestic boilers. It therefore becomes a matter of discretion. For seven years this boiler had been in use without mishap. Then came this very severe frost and that, coupled with the exceptional conduct of the second plaintiff in lighting the fire was the cause of the explosion. The council owed no duty to the second defendant and the appeal should be allowed.

TUCKER L.J. stated the facts and continued: It is clear from the evidence that this boiler, which was a small "Ideal" boiler used for domestic purposes, had in fact been installed without a safety valve. The reason why it exploded was that, in the severe weather of February, 1947, the water system of the house had frozen up. The fuel supplies were low, and Miss Ball had, in the circumstances, unwisely—I do not say negligently—attempted to light a fire in the boiler when the pipes in the house were frozen up. The result was that, owing to the absence of a safety valve, the boiler exploded. I think the evidence showed that, in those circumstances, that was a highly probable event. It might not have happened, the heat might have thawed the ice in the pipes and an explosion might have been avoided, but the evidence showed that an explosion was a highly probable thing to happen if you light up a boiler which has no safety valve when the pipes in the house are frozen. As to the necessity or the desirability of having safety valves, there was some, but not very much, conflict of evidence. The expert witness called for the plaintiffs, a Mr. De Groot, said this in chief. He was asked: "Is there anything very extraordinary about it, or would "you call it an ordinary domestic hot water system? (A.) It "is an ordinary domestic hot water system, with one serious "omission. (Q.) And what is that? (A.) And that is, the "fixing of a safety valve to the boiler itself. (Q.) What is the "common practice in England with regard to the fixing of "safety valves on domestic boilers for heating domestic "hot water supplies? (A.) It is the usual precautionary

---

(1) [1907] 2 K. B. 141.

C. A.
1949
BALL
v.
LONDON COUNTY COUNCIL.
Tucker L.J.

" measure that is taken." In cross-examination it was put to him: " (Q.) I do not want to get you involved in questions " with other engineers, but I put it to you, quite definitely, " that there is no hard and fast rule about there being a safety " valve to a boiler of this size in a house ? (A.) My only answer " to that is that some local authorities insist on a safety valve " being applied on any type of domestic boiler. There is no " hard and fast rule. (Q.) There is no hard and fast rule ? " (A.) There is no hard and fast rule. (Q.) And it is left to the " discretion of the people who put the boiler in as to whether " a safety valve is there or not ? (A.) It is usually left to the " fitters themselves. (Q.) It is left to the discretion of the " fitters ? (A.) Yes. (Q.) With regard to your view after " the event, that a safety valve might have stopped this " explosion, equally it might not ? (A.) Well, my view is that " almost certainly it would have stopped the explosion."

Then Mr. Hutson was called by the defendants. He is a chartered surveyor in the employ of the defendant council. He was asked: " (Q.) Do you express your view as to whether " a safety valve was necessary with a boiler of that size or " not ? (A.) I would say that a safety valve is not necessary " for a boiler of this size. It is a low pressure boiler with the " open expansion pipe that the other witness has referred to. " (Q.) Does that open expansion pipe lead out of the hot water " tank and discharge over the cold water tank ? (A.) That is so. " (Q.) That is all inside the house ? (A.) Yes. (Q.) What sort " of defect would there have to be in the general pipe system " before there would be any excessive pressure ? (A.) A blockage " would be necessary in the flow in the return pipes from the " boiler to the hot water tank." In cross-examination there was put to him a passage from a book by a Mr. Fowler on domestic heating boilers, as follows: " Causes of boiler " explosions—By stoppages in the pipes due to freezing of " the water, by other taps or valves fixed on the circulation " pipes, and by stoppages due to incrustation. To minimize " explosions every boiler should be fitted with a small reliable " safety valve fixed directly on the boiler by the flow-pipe " connexions protruding a short distance beneath the top of " the boiler, and leaving a space for the accumulation of air." Then the question was put to him: " As an architect, do you " agree or disagree with what Mr. Fowler says in what I " understand is a standard work ? (A.) I agree with his " opinion. (Q.) You agree with what he says ? (A.) Yes,

C. A.
1949

Ball v. London County Council.

Tucker L.J.

"except that there is this: he speaks of the safety valve "mounted on the boiler. Safety valves are sometimes "mounted some distance from the boiler."

A Mr. Bright was also called on behalf of the defendants. He is a Master of Arts, took the Mechanical Science Tripos at Cambridge, and is an Associate Member of the Institute of Electrical Engineers and of the Institute of Heating and Ventilating Engineers. He was asked this: "(Q.) Would "you tell my Lord and the members of the jury what your "opinion is with regard to the necessity, in an installation "of this kind, of having a safety valve? (A.) In small "installations of this kind where there are two pipes, flow "and return, both of which are capable of relieving any pressure, "one through the expansion pipe and one through the hot "water tank and again out through the expansion pipe, a "safety valve is not necessary." In cross-examination it was put to him as follows: "I think we are agreed about this, "that if by fitting stop valves at any point in the hot water "system you seal the boiler off from the expansion pipe or "the intake pipe, or both, it is essential to have a safety "valve? (A.) If you are sealing them both, yes. (Q.) If both "exits are sealed off by frost, is it not equally essential to "have a safety valve? (A.) There should either be a safety "valve or the fire should not be alight. (Q.) So, if there "is any likelihood of the sealing off of the pipes by frost and "the likelihood of somebody lighting a fire, a safety valve "is an essential precaution. Is that what you are saying? "(A.) I would say yes. (Q.) It is customary, is it not, to fit "safety valves to domestic boilers? It is a normal thing, "is it not? (A.) Close to the boiler." And in re-examination he made it clear that the practice is very often to fit the safety valve a little way along the pipes and not actually on the boiler itself. We were told, and I think it was agreed, that in fact this type of boiler is supplied without a safety valve because it is required to put dishes and so forth on it, although it is possible to purchase a safety valve to use in connexion with it.

I have referred to that evidence in some detail because I think ultimately it is upon that evidence that we have to decide, as a matter of law, whether this boiler, as fitted in the year 1940, was what is called in law a dangerous thing, so as to impose upon the person who fits it or erects it a special and peculiar duty to third persons, other than those with whom he is in contract or at whose request he is performing the work.

As the learned judge stated in his judgment, and as is conceded by Mr. Sutton, the authorities show that if a landlord, or if a vendor of property, sells or lets a house which is defective to such an extent as to be a danger to the tenant and his family, or the purchaser, and of course to other persons entering the house, he is absolved from liability; he is not under any duty in law resulting from the defective condition of the premises which he sells or lets. That position is so even if he is himself the person who has put the house into that condition and, of course, has knowledge of the dangerous condition in which it is. It follows that, if he is not under any such obligation to the lessee or purchaser, equally he is not under any obligation to a stranger who happens to be visiting the premises. In those circumstances it is not necessary to refer to the authorities as a result of which that proposition of law finally emerges.

But, says Mr. Sutton, there is no authority which establishes that, once a landlord has let premises or has sold them, if thereafter he goes into those premises at the request of the tenant or the purchaser, either as a result of a contract made or at the request of such a person, the mere fact that he happens to be the landlord or the vendor absolves him from the duties which would otherwise attach to a contractor or builder or any other person who is called in to carry out operations on the premises; and I am prepared to accept that as a correct statement of law. There is, certainly, no authority for the proposition that the immunity which attaches to a landlord in respect of the condition of the premises before a lease continues as some sort of magic protection to him at all times subsequent to the lease. I think, therefore, it is necessary to look at the actions of the defendants in the present case, regardless of the fact that they happen to have been the landlords, and to see what their duties are simply as persons who come in, gratuitously it may be, but none the less at the request of the tenant, to carry out an operation on the premises.

With regard to that, there is one authority which is binding upon this court, to which it is necessary to refer and which was not before the learned judge; that is the case of *Malone* v. *Laskey* (1). In that case the facts were that the plaintiff was a married woman and the defendants were the trustees of a building society, who were the owners of certain premises

---

(1) [1907] 2 K. B. 141.

The plaintiff was the wife of a Mr. Malone, and at all material times resided with him at the premises in question, of which and of certain adjoining property the building society were the owners. The defendants erected and placed on their adjoining premises large engines and plant for the purpose of generating electricity to light their property, and it was alleged that they worked the engines and machinery in such a manner as to constitute a nuisance to the occupiers of the adjoining property; that by reason of the vibration the premises in which the plaintiff resided were shaken, and that in particular a water tank fixed in the lavatory was rendered unsafe and dangerous to persons using the same; that in consequence of complaints made by the plaintiff's husband and other occupiers of the premises the defendants from time to time sent workmen to repair the damage and make the premises safe for habitation. It was alleged that the defendants, through their workmen, executed the repairs in a negligent and improper manner, and in such a way as to leave the tank in a dangerous and improper condition for those using the lavatory. Those facts were proved, and as a result of the position in which the tank had been left in the lavatory the plaintiff suffered damage. In the argument it is to be observed that Mr. Powell, on behalf of the plaintiff, argued on appeal with regard to negligence as follows: "a heavy "article like a bracket, placed at a considerable height above "the floor, is a dangerous thing if insecurely fixed, and persons "who, like the defendants, place such an article in such a "position and neglect to make it secure are responsible for "any injury occasioned in consequence to persons whose "coming in the ordinary course of things into proximity to "the article so placed they ought to have contemplated"; and then he quotes certain authorities. Mr. Lush, in his reply, put the matter in this way: "There are only three classes "of case in which the courts have laid down that, apart from "any contractual obligation, such an action will lie, and they "all turn upon the existence of a duty on the part of the person "sought to be made liable. The first is where the act "committed amounts to a public nuisance, which is a breach "of duty alike to the public and to the person who sustains "a particular injury from it. The second is where something "that has been called a 'noxious thing' is left in a position "in which an unknown person may come in contact with "it; the thing so left must, however, fall within the class of "noxious things. The third class is where a person, having "the control of premises, invites another to come upon the "premises."

Those having been the arguments submitted to the court, it was held that in those circumstances the plaintiff could not recover because the defendants owed no duty to her. It is clear from the judgments that the court must have rejected the contention of Mr. Powell that a cistern put in this position could be classified as a noxious or dangerous thing, the handling of which by the defendants would impose upon them an added obligation to take care. Fletcher Moulton L.J. in giving his judgment, said this: "There was no obligation upon the "defendants to do any repairs to the premises, nor was any "suggestion to that effect made at the trial. The repairs "to the cistern which they in fact did were done by them "gratuitously. However, in order to test the plaintiff's case "I will suppose that the defendants did the repairs for reward "to them from Witherby & Co. There would then be a "contractual relationship between Witherby & Co., and the "defendants, and the latter would be bound to exercise "reasonable care to see that the work was properly done. "If the work was done negligently, the defendants would be "liable to Witherby & Co. for the damage done to them "by the negligence, or done to others under circumstances "which involved a liability on the part of Witherby & Co. "But that would be purely a liability on the part of the "defendants to Witherby & Co., for no rights can be acquired "under a contract except by parties to the contract, except "in certain special cases having no bearing on the matters "before us."

Kennedy L.J. stated that he felt more doubt about the question than the other members of the court. None the less, he said in the end: "I accept the finding that the result of "the acts of the defendants' servants was to leave the premises "in a dangerous condition, and I feel some doubt upon what "certainly appears to me to be a difficult point upon that "finding. Upon the whole, however, I am unable to dissent "from the argument presented to us by Mr. Lush that, "assuming the findings of fact to be correct, the case cannot "be brought within the class of cases where the defendants' "liability depends upon his continuing control of the premises, "for here the defendants had none in fact; if the plaintiff "had written a letter of complaint to the defendants, "Witherby & Co. might well have refused to allow the defendants to come in to do the repairs in premises to which they "(the defendants) had no right of entry. Neither does the "case come within the class of case where there is something "noxious or dangerous forming part of a building, which "amounts to a public nuisance. I feel compelled to hold "that no cause of action has been in point of law established."

I think that that case, which is binding on us and which has never been overruled, prevents the plaintiff, Miss Ball, from succeeding in this action, unless she can show what the plaintiff failed to show in that case, that the article in question, or the part of the premises in question where this boiler was installed, was thereby rendered dangerous or noxious within the meaning of those words in the cases which have decided that articles of that kind impose upon persons installing them a high degree of duty. That kind of case is, I think, exemplified clearly in *Parry* v. *Smith* (1) and *Dominion Natural Gas Co. Ld.* v. *Collins, Perkins and Others* (2). The headnote in the former of those two cases reads: "The defendant, a "gas-fitter, was employed by the plaintiff's master to repair "a gas-meter upon his premises, and for the purpose of doing "so took away the meter and in lieu of it made a temporary "connexion by means of a flexible tube between the inlet "pipe and the pipe communicating with the house. The "plaintiff having gone, in the ordinary performance of his "duty, with a light into the cellar where the meter had been, "gas, which had escaped by reason of the insufficiency of "the connecting tube, exploded and injured him. The jury "found that the work had been negligently done, and that the "injury to the plaintiff proceeded entirely from such "negligence"; and it was held that the defendant was liable. Lopes J., in giving his judgment, said: "It was contended "by Mr. Finlay, on the part of the plaintiff, that the action "would lie, because the defendant knew he was dealing with "gas, a thing highly dangerous in itself unless great care "and caution were used in its management; that the "plaintiff's right of action was founded, not on contract, but "on the duty which attaches to the use or dealing with a thing "in its nature highly dangerous and likely to cause damage, "unless managed with great care and caution," and he proceeded: "I think the plaintiff's right of action is founded "on a duty which I believe attaches in every case where a

(1) 4 C. P. D. 325.

(2) [1909] A. C. 640.

" person is using or is dealing with a highly dangerous thing, " which, unless managed with the greatest care, is calculated " to cause injury to bystanders. To support such a right " of action, there need be no privity between the party injured " and him by whose breach of duty the injury is caused, nor " any fraud, misrepresentation, or concealment ; nor need " what is done by the defendant amount to a public nuisance. " It is a misfeasance independent of contract."

In *Dominion Natural Gas Co. Ld.* v. *Collins, Perkins and Others* (1), Lord Dunedin, dealing with the case of the gas company, who were one of the defendants in the action, said : " To come to the position of the gas company. The gas company were not occupiers of the premises on which the " accident happened. Further, there being no relation of " contract between the company and the plaintiffs, the " plaintiffs cannot appeal to any defect in the machine supplied " by the defendants which might constitute breach of contract. " There may be, however, in the case of any one performing " an operation, or setting up and installing a machine, a " relationship of duty. What that duty is will vary according " to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles " dangerous in themselves, such as loaded firearms, poisons, " explosives, and other things ejusdem generis, there is a " peculiar duty to take precaution imposed upon those who " send forth or install such articles when it is necessarily the " case that other parties will come within their proximity. " The duty being to take precaution, it is no excuse to say " that the accident would not have happened unless some " other agency than that of the defendant had intermeddled " with the matter. A loaded gun will not go off unless some " one pulls the trigger, a poison is innocuous unless some one " takes it, gas will not explode unless it is mixed with air " and then a light is set to it. Yet the cases of *Dixon* v. " *Bell* (2), *Thomas* v. *Winchester* (3), and *Parry* v. *Smith* (4), " are all illustrations of liability enforced. On the other hand, " if the proximate cause of the accident is not the negligence " of the defendant, but the conscious act of another volition, " then he will not be liable."

I think those are the principles which we have to apply to the present case, treating the defendants as ordinary contractors and not as landlords. It is quite clear that if this boiler as constructed is a dangerous or noxious thing within the meaning of those words of Lord Dunedin, then the defendants would be liable to strangers who might be contemplated as likely to visit the house, notwithstanding that they had no contract with such persons and notwithstanding that their contractual rights, as between themselves and the tenant, might be defined by the contract and not be limited in their nature.

---

(1) [1909] A. C. 640, 646.
(2) (1816) 5 M. & S. 198.
(3) (1852) 6 N. Y. 397.
(4) 4 C. P. D. 325.

What is or what is not a dangerous thing is, of course, an extremely difficult matter to decide. The difficulty which has been felt about this by learned judges is referred to, and some of their expressions of opinion are very conveniently summarized, on p. 570 of the 10th ed. of Salmond on Torts, where the well-known observations of Scrutton L.J. are referred to when he said: "Personally I do not understand "the difference between a thing dangerous in itself, as a "poison, and a thing not dangerous as a class, but by negligent "construction dangerous as a particular thing. The latter, if "anything, seems the more dangerous of the two; it is a "wolf in sheep's clothing instead of being an obvious wolf." Then the language of Lord Atkin in *Donoghue* v. *Stevenson* (1) is referred to: "Lord Atkin regarded 'the distinction as an "'unnatural one so far as it is used to serve as a logical "'differentiation by which to distinguish the existence or "'non-existence of a legal right'"; but the learned author goes on to observe: "but all the members of the House in "*Donoghue* v. *Stevenson* appear to have agreed that the "distinction, whether natural or not, is accepted in English "law." Lord Wright, in another case, after giving illustrations of the category of dangerous things, such as a savage animal and a performance on a flying trapeze, defined an inherently dangerous thing as "something which, if left, "may at any moment, and under modern circumstances, "cause damage," and said that "a naked sword or a hatchet "or a loaded gun or an explosive are clearly inherently "dangerous, that is to say, they cannot be handled without a "serious risk."

I certainly do not propose to embark upon the perilous course of attempting to define what is or what is not a dangerous thing, nor do I think any of the noble Lords there referred to were endeavouring to do so. I think it may often be very difficult to draw the line; but in the present case we are dealing with an ordinary domestic apparatus, as to which, according to the evidence, the practice differs with regard to the supply of these boilers with or without safety valves. That the provision of a safety valve is desirable and to be recommended is beyond dispute; that a boiler without a safety valve may be regarded as unsatisfactory is also, I think, clear from the evidence, and the learned judge so found; but that does not, in my view, put it into the category of things which are dangerous per se, which imposes this extended liability on defendants in the position of the London County Council. It was a thing which operated without mishap for some seven years in the ordinary normal working. It was not as if it was something which had been supplied in such a condition that directly steam was generated there was bound to be an explosion; in the ordinary normal way the steam was carried off. What caused the explosion were two very unusual circumstances: first, the very severe winter, and, secondly, the ill-advised action of Miss Ball in lighting up this boiler when the pipes were frozen. I cannot myself think that a boiler so installed comes within the category of dangerous things with which the courts have dealt in the past. I do not think the case was really framed in that way. In the careful pleading to which I have already referred, and to which the learned trial judge referred, the case was not really put on that basis at all. The duty was alleged to be that "in carrying out the said installation the defendants, "their servants or agents, owed a duty to the first-named "plaintiff, the members of her family and all persons entering "and being likely to enter and be within the said kitchen, "to carry out the same in a proper and workmanlike manner "and so to install the said boiler that it would be as safe for "the said purpose as reasonable skill and care could make it." I think the plaintiffs have to prove a much higher duty than that, and that they have failed to do so.

---

(1) [1932] A. C. 596.

It is necessary to refer quite shortly to the learned judge's judgment, in which he dealt with this matter in some detail and with care. Putting himself in the position of the jury, who had previously been discharged by consent, he asked himself this question: "Was the boiler as installed by the "London County Council dangerous?" and he answered that "Yes." Then he asked himself: "Was that condition "either known or such as by the exercise of reasonable skill "and care would have been known to the London County "Council?" and he answered that "Yes." Then he absolved Miss Ball from negligence and found in her favour. He dealt with the authorities, and finally he came to *Bottomley* v. *Bannister* (1). There he relied on the following observation of Greer L.J.: "The result is unsatisfactory, because in the "present case, if the landlord instead of doing the work himself "before he sold the house, had done it afterwards as a contractor "to Mr. Bottomley, he would have been liable if there were "sufficient evidence that it was negligence on his part to have "installed the Halliday boiler without a flue."

Stable J. proceeded: "In my judgment, that principle "applies even though the boiler was put in gratuitously "without extra charge, and the duty arises, as I think "Greer L.J. clearly indicates it does, as a matter of tort and "not of contract. It is a duty that is owed to the persons "who, in the ordinary course of human life, would use the "things."

The criticism which I venture to make is that I think the position as envisaged by Greer L.J. was of a landlord coming in and doing work negligently after the sale or after the lease, which would no doubt impose a contractual liability upon him to the tenant who had called him in. If Greer L.J. was intending to say, as I do not think he was, that in the carrying out of that contract the landlord would owe a duty to strangers who happened to be injured by the negligent performance of that contract, he would have been saying something which was contrary to the decision in *Malone* v. *Laskey* (2). The matter has to be carried a stage further. A stranger can only recover if the operation is in connexion with something which is a dangerous thing in itself. Stable J. does not appear to me in his judgment to have directed his mind to the question, which is a question of law, whether on the evidence given in this case this particular boiler comes into the category of things which the law regards as dangerous per se. For these reasons I have arrived at a different conclusion, and would allow this appeal.

It is only necessary to add that the whole of this argument has been confined to the claim of Miss Ball. As to the five guineas awarded to Mrs. Ball, Mr. Russell Vick, without in any way admitting that any liability is owed by the defendants to her, has not desired, having regard to the smallness of the

(1) [1932] 1 K. B. 458.

(2) [1907] 2 K. B. 141.

sum in question, to argue that point, and has been content to confine his appeal to the case of Miss Ball.

EVERSHED L.J. I have come to the same conclusion, though I confess that I do so with some regret, feeling, as is natural enough, no little sympathy for the unfortunate Miss Ball, who suffered serious injury as a result of work which, as the judge found, and we must hold, was negligently done. As my Lord observed, we are concerned only with the case of Miss Ball. Mr. Russell Vick has accepted, without conceding, his liability, small in amount, to Mrs. Ball, and it may well be (though obviously in the circumstances I cannot say more about it) that Mr. Vick is wise so to do; for though, as it is pleaded, the work at the house was gratuitously done, in the circumstances I can see at least an argument that it was done pursuant to some such undertaking or arrangement as formed the foundation of the decision of the judge of first instance in *Davis* v. *Foots* (1). But Miss Ball is, on any view, a stranger to any such undertaking, arrangement, or contract, whether of tenancy or otherwise, within the language of Lopes J. in the passage which my Lord has already read. She is a person between whom and the council there is no privity. The question therefore is: assuming that the London County Council owed anybody any duty when they put in the new boiler, did they owe a duty to Miss Ball? So expressed, it seems to me that the case falls within a small compass, and that the answer is that it is governed by the principle of *Malone* v. *Laskey* (2), a case which, I gather, unhappily was not cited to the learned judge in the court below. Had it been cited, I cannot for my part help thinking that the formulation by the judge of the cause of action which he found Miss Ball to have would have been differently stated. The cause of action was framed with a lucidity about which I do not desire to say anything further, by the learned counsel in his statement of claim, and my Lord has already read it; but both that formulation and the passage at the end of the learned judge's judgment, which my Lord has already also read, seem to me to be too widely stated and, unless qualified, to be inconsistent with *Malone* v. *Laskey* (2).

I entirely agree with Mr. Sutton that in the circumstances of this case it is an irrelevant consideration that the London

---

(1) [1940] 1 K. B. 116.

(2) [1907] 2 K. B. 141.

County Council, who did the work in question, were the landlords of Mrs. Ball. But if they are to owe a duty to somebody with whom they had no privity, then, as it seems to me, it must be shown that the case falls within one of the three categories which were cited by Mr. Montague Lush (as he then was) in his reply in the case of *Malone* v. *Laskey* (1). If I may take an example, suppose the London County Council had done some repair work to the roof negligently, so that the roof leaked, and as a result of that leak property of Miss Ball were damaged; it seems to me, on the authority of *Malone* v. *Laskey* (1), quite impossible to say that the London County Council owed such a duty to Miss Ball as would make them liable for the damage flowing from their incompetent work on the roof. For present purposes it seems to me that, as my Lord has already said, if Miss Ball is to succeed the case must be shown to fall within the category of which illustrations have been taken both from the judgment of Lopes J. in *Parry* v. *Smith* (2) and from Lord Wright in the citation from the last edition of Salmond, and there is no finding here that the boiler, as the London County Council left it, was a dangerous thing within those passages. True there was a finding that it was dangerous and, indeed, it proved itself so in no uncertain fashion; but so was the cistern in *Malone* v. *Laskey* (1), and it is perhaps worth noting that the fourth question put to the jury, and the answer thereto, in that case, were as follows: "Did the "defendants, when they put up the bracket and placed "the tank upon it, do this work in an improper or negligent "manner, and leave the apparatus in a condition dangerous "to anyone properly using the lavatory?—(A.) Yes."

What in fact caused the calamity in the present case was, as my Lord has already stated, the combination of a quite exceptionally hard frost in the winter of two years ago, and the somewhat temerarious conduct of Miss Ball in lighting the boiler fire in order to thaw out the frozen pipes. I do not wish to go through the evidence which my Lord has analysed. It seems to me impossible to say that the plaintiff, Miss Ball, has established a case that the boiler, as left, was ejusdem generis, so to speak, with the instances given, of loaded pistols, explosives, and such like. I say nothing whatever about the propriety of the London County Council in having not fitted in the circumstances a safety valve to this boiler.

---

(1) [1907] 2 K. B. 141.

(2) 4 C. P. D. 325.

C. A.
1949
BALL
v.
LONDON
COUNTY
COUNCIL.
Evershed L.J.

As I have already indicated, if what they did was done on the terms of any contract or arrangement with their tenant, it may well be that they would be liable to her for their negligent conduct in failing to fit a safety valve, and not only for any damage she personally may have suffered, but for any obligation which she herself might have been under to other people; but that, as I have indicated, does not seem enough. In order that they may be held liable to strangers, the case must be, as I have said, within the category of dangerous things.

For reasons which I do not wish further to repeat, the plaintiff, in my judgment, has failed to bring the case within that category.

I have stated my reasons briefly because we are differing from the learned judge, but I also wish to endorse everything that has fallen from my Lord, and for the reasons which he has given, as well as those which I have briefly stated, I agree that the appeal should be allowed.

SINGLETON L.J. It seems to me that whether the plaintiff Miss Ball, is entitled to succeed and whether she is entitled to hold the judgment given in her favour by Stable J. depends entirely on whether she comes within the words of Lord Dunedin in the case of *Dominion Natural Gas Co. Ld.* v. *Collins and Perkins* (1), or, if I may put it in another way, whether she comes within the passage which my Lord has already read, and which I venture to read again, from the judgment of Lopes J. in *Parry* v. *Smith* (2). The learned judge said: "I think the plaintiff's right of action is founded "on a duty which I believe attaches in every case where a "person is using or is dealing with a highly dangerous thing, "which, unless managed with the greatest care, is calculated "to cause injury to bystanders. To support such a right "of action, there need be no privity between the party injured "and him by whose breach of duty the injury is caused, "nor any fraud, misrepresentation, or concealment; nor "need what is done by the defendant amount to a public "nuisance. It is a misfeasance independent of contract." So that in order for Miss Ball to hold her judgment, it must be shown, as I think, that that which the defendants installed in her mother's house was a highly dangerous thing, or at least a dangerous thing as installed.

---

(1) [1909] A. C. 646.

(2) 4 C. P. D. 325, 327.

The boiler was installed seven years, roughly, before the explosion, and it had worked, so far as we have been told, without any complaint. An expert witness called on behalf of the plaintiff, Mr. De Groot, was asked : " Is there anything " very extraordinary about it, or would you call it an ordinary " domestic hot water system ? (A.) It is an ordinary domestic " hot water system, with one serious omission." The serious omission was the lack of a safety valve. If one asked, what is the purpose of a safety valve, the answer one would receive, I suppose, would be, to promote safety or to give additional protection or safety. The witness described the lack of a safety valve as a serious omission. He was cross-examined, and in answer to the question, " I do not want to get you " involved in questions with other engineers, but I put it to " you, quite definitely, that there is no hard and fast rule " about there being a safety valve to a boiler of this size in " a house ? " he said this : " My only answer to that is that " some local authorities insist on a safety valve being applied " on any type of domestic boiler. There is no hard and " fast rule." He was giving evidence in the year 1948 ; this installation was in the early days of the war, 1940 or thereabouts. If there was no hard and fast rule for local authorities in the year 1948, it is difficult to see that there could be any regular practice at least in the year 1940 or 1942. Again, if there is or was no hard and fast rule among local authorities in matters of this kind, it is a little difficult to see that it is shown, upon that evidence at least, that this boiler as installed was a dangerous or a highly dangerous thing.

There were two other witnesses to whose evidence I would refer. One was the defendants' representative, Mr. Hutson, who was asked : " Do you express your view as to whether " a safety valve was necessary with a boiler of that size or " not ? " and he answered : " I would say that a safety valve " is not necessary for a boiler of this size. It is a low pressure " boiler with the open expansion pipe that the other witness " has referred to." The matter was not very fully pursued. There was no examination, so far as I can find from the transcript, as to the difference between a high pressure boiler and a low pressure boiler for this purpose. Mr. Bright, an expert witness called on behalf of the defendants, was cross-examined by the learned junior counsel for the plaintiffs, and was asked : " If both exits are sealed off by frost, is it " not equally essential to have a safety valve ?—(A.) There "should either be a safety valve or the fire should not be "alight." I would draw attention to the fact that when the ordinary householder in the morning seeks to light the boiler to heat some water, he cannot always know, or she cannot always know, whether the pipes are frozen or not. The witness was asked further: "So, if there is any likelihood "of the sealing off of the pipes by frost and the likelihood "of somebody lighting a fire, a safety valve is an essential "precaution. Is that what you are saying? (A.) I would "say Yes. (Q.) It is customary, is it not, to fit safety valves "to domestic boilers? It is a normal thing, is it not? (A.) Close "to the boiler."

The witness agreed with some extracts from Mr. Fowler's book which were read to him. The result of that experienced witness's evidence shows this, that if there may be frost, so that the external pipes are frozen, a safety valve is an essential precaution. Everyone knows there may be frost; everyone knows that pipes may become frozen; it is for that reason, I imagine, in part at least, that a safety valve is regarded sa the usual or normal fitting upon or near a boiler. The witness further showed that it was the normal practice to have a safety valve fitted close to a boiler, and I imagine he was dealing with a boiler of this kind.

I have been greatly troubled in this case to know why the London County Council departed from what was and is the normal practice. I asked several times in the course of the hearing, and Mr. Russell Vick on their behalf assured us that they were most anxious to keep nothing back. From what he told the court they could for a few shillings have acquired a safety valve and their man could have fitted it. Whether they had them in stock at that time I do not know. It is right to say that it was in war-time; there may have been shortages. I wondered again, in the course of the hearing, what is the practice of the London County Council to-day. As far as I gathered from Mr. Russell Vick, it may be just the same as it was, not to install safety valves. I hope it is not; I cannot believe that it is.

The trouble in deciding this case is to arrive at a true conclusion upon the evidence as given in the court below. When one has an admission from the plaintiffs' expert witness that there is no hard and fast rule as to having safety valves, even at the time of the trial, and when one has, from a witness for the defendants, the fact that he thinks it is unnecessary

C. A.
1949
Ball v. London County Council.
Singleton L.J.

to have a safety valve in a small boiler of this kind, indeed, when one sees from that evidence that there is a divergence in practice, it seems to me difficult, to say the least, to come to a conclusion that that small boiler as installed was dangerous of itself. I do regard a safety valve as necessary because of the danger of blocking of pipes, either by frost or otherwise, and although I agree in the result, that this appeal must be allowed, I am most anxious that it shall not go out from this court that a safety valve is unnecessary on boilers in general, or even on this type of small boiler. I believe that, had one been fitted on this boiler, the terrible injury which this plaintiff suffered would have been avoided, there would have been no explosion. It is for that reason that I thought it right to add something, because I do not think that the judgment of this court ought to be used in any sense as meaning that safety valves are unnecessary. If the evidence for the plaintiff had been a little different the judgment of this court might well have been different.

Appeal allowed.
Leave to appeal further.

Solicitor for plaintiffs: *G. Howard & Co.*
Solicitor for defendants: *J. H. Pawlyn.*

A. W. G.

1949
Mar. 17, 18;
Apr. 11.
Hilbery J.

MALLETT AND ANOTHER *v.* DUNN.

Husband and wife—Husband suing in respect of injuries caused to wife—Contributory negligence of the wife—No effect on husband's claim—Husband's cause of action distinct from that of wife—Law Reform (Contributory Negligence) Act, 1945 (8 & 9 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 1.

A husband who sues for damages caused to him by reason of injuries negligently inflicted on his wife sues in his own right, and the fact that the wife was guilty of contributory negligence neither defeats his claim at common law nor causes any diminution of his damages under the Law Reform (Contributory Negligence) Act, 1945.

The decision of the Canadian Court in *Young and Young* v. *Otto* [1948] 1 D. L. R. 285 to the contrary not followed.

Action tried by Hilbery J.

About noon on January 6, 1948, the first plaintiff, wife

1949

MALLETT
v.
DUNN.

of the second plaintiff, was walking along Church Lane, Headley, Surrey, when she was knocked down by a motor-car driven by the defendant, sustaining multiple injuries. She was walking in the same direction as that in which the vehicle was travelling. The plaintiffs sued the defendant to recover damages for personal injuries sustained by the first plaintiff and for losses and expenses incurred by both plaintiffs as the result of the negligent driving of a motor-car by the defendant. The defendant pleaded that the first plaintiff had been guilty of contributory negligence.

Hilbery J. held the defendant responsible for the accident to the extent of three-quarters and the first plaintiff as to one-quarter. His Lordship assessed the damages suffered by the first plaintiff at 1,500*l.* and reduced them in proportion to the negligence attributed to her. The husband claimed 295*l.* special damages. The question was now argued whether the special damage claimed by the husband was subject to reduction under the provisions of the Law Reform (Contributory Negligence) Act, 1945, by reason of the measure of contributory negligence attributable to the wife.

Glyn-Jones K.C. and *Glazebrook* for the plaintiffs. The husband is entitled to recover the whole of the special damage which he claims without any deduction. His cause of action does not arise from and is not a mere appendage of his wife's cause of action, but is separate and independent. It is true that the cause of action of each of them depends on proof of the fact that the defendant by negligence has caused injury to the wife, but the two causes of action remain separate. The fact that the wife by her negligence contributed to cause the accident would have entitled the defendant to judgment against her before the passing of the Law Reform (Contributory Negligence) Act, 1945, none the less the husband could have recovered just as he could in other cases where the wife had no cause of action, e.g., where she had been persuaded by the defendant to leave her husband. Since the year 1945, the wife has a cause of action albeit for less than her full damages, but the husband's position is unaffected. There is no statutory provision for reducing his damages in proportion to the reduction of his wife's damage. He is not a person who has suffered damage by reason partly of his own fault within the meaning of the Law Reform (Contributory

550
$1550 - \frac{1}{3} = 1000$

Negligence) Act, 1945 (1). He was not at fault at all and therefore that Act does not affect him. [*Barber* v. *Pigden* (2), referred to.]

Cyril Salmon K.C. and *Armstrong-Jones* for the defendant. At common law the husband's case depended on his establishing that his wife had an enforceable claim. If her claim could be defeated by contributory negligence the husband's claim failed with it. In this case contributory negligence has been found against the wife. It was true that the Law Reform (Contributory Negligence) Act, 1945, operated to save the wife's claim in part, but it had no application to the claim made by the husband. Alternatively it could operate to save only the same fraction of the husband's claim as it saved of the wife's claim: see *Young and Young* v. *Otto* (3), decided by the Supreme Court of Alberta, when the Contributory Negligence Act, R. S. A. 1942, c. 116, and the Married Women's Act, R. S. A. 1942, c. 301 were considered. There is no reported case of a husband succeeding where his wife failed. The husband's claim per quod consortium amisit was derived (*a*) from his status as husband and (*b*) out of the wife's cause of action. [*Baker* v. *Bolton* (4), *Brockbank* v. *The Whitehaven Junction Ry. Co.* (5), and Blackstones Commentaries, Vol. III., p. 139, referred to.]

Cur. adv. vult.

April 11. HILBERY J. At the conclusion of this case I decided that so far as the claim for personal injuries was the claim of the first plaintiff, wife of the second plaintiff, the claim was partly met by the defendant having established some contributory negligence on the part of that plaintiff. Accordingly I acted on the provisions of the Law Reform (Contributory Negligence) Act, 1945, and reduced her claim to the extent which I thought just and equitable, having regard to that claimant's share in the responsibility for the damage which she had sustained.

---

(1) Law Reform (Contributory Negligence) Act, 1945, s. 1, sub-s. 1: "Where any person "suffers damage as the result "partly of his own fault and "partly of the fault of any other "person or persons, a claim in "respect of that damage shall "not be defeated by reason of "the fault of the person suffering "the damage, but the damages "recoverable in respect thereof "shall be reduced to such extent "as the court thinks just and "equitable having regard to the "claimant's share in the responsibility for the damage."

(2) [1937] 1 K. B. 664, 677.

(3) [1948] 1 D. L. R. 285.

(4) (1808) 1 Camp. 493.

(5) (1862) 7 H. & N. 834.

The question then arose what effect, if any, had that finding upon the claim by the husband. It was argued by the defendant that the husband's claim must wholly fail since it depended on establishing in the first place a tortious act done to his wife for which the defendant was responsible in law, and, unless his claim was saved by the Law Reform (Contributory Negligence) Act, 1945, the defendant, having established the contributory negligence of the wife, had absolved himself in law from responsibility for the alleged tortious act; and secondly, that if the husband's claim was not wholly defeated it was abated in the same proportion as that of the wife by reason of the provisions of s. 1, sub-s. 1, of the Law Reform (Contributory Negligence) Act, 1945.

The questions thus raised can only be answered by examining, and if possible discovering, the true legal basis of the husband's claim. If, in order to sustain his claim, the husband must be regarded as standing in his wife's shoes and his cause of action be the same as hers, then it must be true to say that what is an answer to her is an answer to him. If on the other hand his cause of action is one which is distinct from that of his wife, and is personal to him, then what would suffice to answer his wife's claim, because it is her claim, would not necessarily defeat his action. The husband's cause of action is a remedy given by the common law to enable him to recover the personal damage which he has suffered through a tortious act of the defendant which has injured his wife and consequentially injured him. The husband has always had at common law a remedy, enforced by an action on the case, for injury done to him by an interference with his right of consortium and for the consequential damage suffered by him. Nor does that action lie solely when the defendant has tortiously injured the wife: it lies for any tortious act of a defendant which deprives a husband of consortium of his wife. An action still lies at the suit of a husband against a defendant for enticing and persuading a wife to leave her husband. In each of these cases the gist of the husband's action as the old-time lawyers expressed it, lay in the per quod, that is to say, the basis of the action was that it was to recover for the husband the damage done to him and to his rights as a husband. The wife's right to damages for the same act of the defendant as was complained of by the husband was a different and distinct cause of action. She had to join with her husband in an action to recover the damages which were claimed for the injury done to her, because at that time a married woman could not acquire or own, with certain exceptions, any property apart from her husband and so he had to join as a party in a claim for her damages. But from the earliest time the husband could bring his action for the wrong done to him per quod consortium amisit without joining his wife as a co-plaintiff. His cause of action was his own and distinct from that of his wife's; it was for the wrong done to him. The headnote to *Hyde* v. *Scyssor* (1) begins as follows: "In trespass for beating a "wife both the husband and wife must join in the action: "but if it be with a per quod consortium amisit, the husband "may sue alone." The first error assigned in that case was that the action was by the husband solely for the battery of his wife which ought not to be; for the tort and damages are properly done to the wife and therefore the husband sole without the wife could not maintain this action; and the damages being entirely given the judgment is erroneous. As to that objection the report states: "But all the justices "and barons held, that true it is the husband, for the battery "of his wife, ought to join his wife with him in the action, "if this had been brought for that cause; but here the action "is not brought for the battery of his wife but for the loss "and damage of the husband, for want of her company and "aid: and all is concluded with the per quod consortium "amisit which extends to all that was before; as where an "action brought by the master for the battery of his servant, "per quod servitium amisit."

Here then is direct authority for the statement so often to be found in the textbooks that the husband's cause of action is separate from that of the wife. How distinct the two causes of action were is plain from the fact that the wife's claim for damages for the personal tort done to her died with her. Her husband had to be joined with her in an action for the damage she had suffered, and if the action was brought for those damages only it died with her because the action was brought to remedy the wrong done to her. Moreover her claim for the damage she had suffered was so personal to her that it survived the death of the husband, and she might bring the action after his death.

---

(1) (1620) Cro. Jac. 538.

In Bacon's Abridgement, vol. 1, p. 732, under the title Baron and Feme it is said: "For a battery or other personal "tort done to the wife they must join, and if the wife dies "the action dies with her. Not for personal or other wrongs "done to them both, unless they have a joint interest, and "they have wrong in respect thereof. But the baron may "bring an action alone for the battery, carrying away and "detaining of his wife, per quod solamen et consortium "of his said wife amisit, because the action is founded upon "the special damage done to himself, and will be no bar "to another action brought by baron and feme, or by the "feme after the death of the baron, for the same battery." I have searched for any authority which lays it down that such an action by a husband for a tort done to his wife per quod consortium amisit was defeated by the defendant showing that the wife had been guilty of contributory negligence. Nor do I see any sound reason why it should be. The claim by the wife was answered if at the conclusion of the case all that had been established was that both she and the defendant had tortiously caused her injury and damage, that is to say, if the defendant had proved that she had been guilty of contributory negligence. But it was implicit in such a result that the defendant had been guilty of negligence, id est the tort alleged against him. It might be just to say that the plaintiff wife ought not to obtain compensation out of the defendant's pocket where she herself was also a cause responsible for her injury and damage.

In an action by the husband per quod consortium amisit he must show, as the first part of his action on the case, a wrongdoing of the defendant which has resulted in the damage which the husband claims. If in such an action the husband shows that the defendant was negligent in a way which was partly the cause of the injury to his wife as a consequence of which he suffered the damage he claims, he has proved the tort alleged. In my opinion he is then entitled to succeed just as a passenger in a vehicle who claims that the defendant, the driver of the other vehicle which collided with that in which the plaintiff was riding, is entitled to succeed although the defendant shows that there was contributory negligence on the part of the driver of the vehicle in which the plaintiff was a passenger. The law says that the passenger is not dependent on his driver's cause of action. The passenger is not identified with his driver and is not defeated through the wrongdoing of his driver which contributed to bring about the accident and the plaintiff's injury. For the reasons I have given, in my opinion the husband's claim is likewise not defeated by the fact that his wife was guilty of wrongdoing which was also a cause of the injury to her as a consequence of which he has suffered damage.✓

It was not the wife who gave her husband the right to consortium, it was the status of marriage which gave that right. The husband did not derive his cause of action from his wife but from his marriage. Some support for this line of reasoning is to be found by glancing at the other action on the case given to the husband per quod consortium amisit to which I have already alluded, the action for damages for enticing away a wife. In such an action the fact that a wife is shown eventually to have chosen to leave her husband as a result of persuasion, or inducement, or incitement, or procuring on the part of the defendant is not only no answer to the claim by her husband against a defendant for damages for so bringing about his wife's desertion of him, it is in fact the basis of the cause of action given him by the law. *Winsmore* v. *Greenbank* (1), and per Wright J. in *Smith* v. *Kaye* (2), quoted with approval by Scrutton L.J. in *Place* v. *Searle* (3). In such a case the claim is not based on duress of the wife, which would mean that her will did not go with her act of leaving nor is it alleged that the wife has been forcibly taken away. The cause of action is for the persuasion, or inducing of the wife so that she yields and voluntarily goes. The fact that the husband's loss of consortium in such cases is partly the result of the wife's own wrongful act in leaving her husband in breach of her legal duty to reside and consort with him is a fact in the case which has no effect on the husband's cause of action. None the less, as in the case of contributory negligence she has herself been guilty of a legal wrongdoing without which her husband would not have suffered the injury and damage for which he brings his action. In my view the husband's cause of action here is unaffected by the contributory negligence of the wife and he recovers his damage in full.

If it be right that the husband's cause of action per quod consortium amisit is his own and distinct from the claim made by his wife, as I hold, it follows that it is not within

---

(1) (1745) Willes 577.
(2) (1904) 20 T. L. R. 261.
(3) [1932] 2 K. B. 514.

1949

MALLETT
v.
DUNN.

Hilbery J.

the words of the Act of 1945. Section 1 applies in express terms to a case where any person suffers damage as the result partly of his own fault and partly of the fault of another person, and a claim in respect of that damage is not to be defeated by reason of the fault of the person suffering the damage.

The husband making his own claim for the damage which he has sustained is not a person claiming damages the result partly of his own fault. He has not been at fault. Since the Law Reform (Married Women and Tortfeasors) Act, 1935, there seems no vestige of a reason left for imputing a wife's contributory negligence to her husband. She has full responsibility for her own tort. She is a fully independent legal person.

Young and Young v. *Otto* (1), was cited to me as showing that in Canada it has been held that such a husband's claim as I am here considering abates by the same fraction as that of the wife where contributory negligence on the part of the wife is found by the court. I have read the report. The view which the Canadian courts seem to have taken is that before the Act of 1945 the husband's claim would have been defeated by a decision that his wife had been guilty of contributory negligence, and that since the passing of the Act in question the defendant's liability for the consequences of the accident in question is limited to his proportion of fault and he is answerable only to that extent towards the person claiming damages resulting from the accident although the claimant be the husband of a wife who has been injured, or the father of a child. The court there has said that the true purport of the Act " is a limitation as to responsibility." With great respect to those who have so held, I think that the Act is not so framed. In express terms it only applies to a claim by a person who suffers as the result partly of his own fault. This cannot apply to the husband's claim unless his claim is identified in law with that of his wife's. I have endeavoured to show why in my view it is not so identified. In my opinion the husband here must succeed as to all his claim or totally fail. In my judgment he succeeds.

Judgment accordingly.

Solicitors for the plaintiffs: *Neil Maclean & Co.*
Solicitors for the defendant: *Wm. Easton and Sons.*

L. F. J. McD.

---

(1) [1948] 1 D. L. R. 285.

C. A.

1949
Apr. 13.

Somervell and
Cohen L.JJ.

NAGY *v.* CO-OPERATIVE PRESS LD.

Practice—Libel action claiming injunction and damages—No defence—Plaintiff not bound to move for judgment—Right to have action set down for trial—Rules of Supreme Court, 1883, *Or.* 27, *r.* 11, *Or.* 30, *r.* 1, *Or.* 36, *r.* 1.

A plaintiff brought an action for libel in which he claimed an injunction and damages. The defendants put in no defence. *Held,* that the plaintiff was not bound to move for judgment under R. S. C. Or. 27, r. 11. He was entitled to have the action set down for trial by a judge and jury for the purpose of having the damages assessed. Notwithstanding the fact that the defendants had put in no defence and accordingly the pleadings had not been closed, the plaintiff was entitled to take out a summons for directions under Or. 30, r. 1, and the master had jurisdiction under Or. 36, r. 1, on that summons for directions to make an order for the trial of the action by a judge and jury or, alternatively, there was power to take out such a summons and to make such an order under the inherent jurisdiction of the court.

Morse v. *Frost* [1927] 1 K. B. 231 followed.

APPEAL from Birkett J.

The plaintiff in this libel action put in a statement of claim in which he claimed an injunction and damages. The defendants put in no defence. The plaintiff did not move for judgment under R. S. C. Or. 27, r. 11, but took out a summons for directions under Or. 30, r. 1, asking that the action might be tried in Middlesex by a judge and jury and that it might be set down within seven days and for ancillary directions. Master O'Donnell made the order for which the plaintiff asked and his order was affirmed by Birkett J. The defendants appealed.

Pritt K.C. and *John Thompson* for the defendants. The defendants have put in no defence and admit that the only matter now in issue is the amount of the damages. In these circumstances the question is what is the procedure prescribed by the Rules of the Supreme Court. It is submitted that as this is an action for unliquidated damages the plaintiff could have proceeded by motion for judgment under Or. 27, r. 11 (1). In that case a writ of inquiry would under Or. 14,

---

(1) R. S. C. Or. 27, r. 11: "In "all other actions than those "in the preceding rules of this order mentioned, and those to "which r. 18 of this order applies "if the defendant makes default

r. 7A have issued to assess the damages. There is nothing in the rules which suggest that there is any other course open to a plaintiff in such a case. In Or. 27, r. 11, the phrase "the "plaintiffs may set down the action on motion for judgment" means that the plaintiff is not bound to apply for judgment, it does not mean that the plaintiff can ask for a different method of procedure to be applied. The case of *Morse* v. *Frost* (1) turned on the true construction of Or. 27, r. 4, and is no authority in the construction of r. 11 of that order. It is submitted that in this case the plaintiff cannot take out a summons for directions under Or. 30, r. 1 (*a*) (2), as that rule only applies to an action where the pleadings have been closed. As no defence has been delivered here the pleadings have not been closed.

Quintin Hogg for the respondent, the plaintiff. This is a case where the damages should be assessed by a judge and jury. The defendants contention is that by reason of their failure to deliver a defence they can force the plaintiff to have the damages assessed on a writ of inquiry under Or. 14, r. 7A. The right of a plaintiff to have his damages assessed by a judge and jury has not been taken away by any express or implied provisions in the rules. When no defence is delivered a plaintiff has an option. He can apply by motion for judgment under Or. 27, r. 11, or, alternatively, he can allow the action to follow its ordinary course. The principle laid down in *Morse* v. *Frost* (1) applies here. Rule 4 of Or. 27 there considered is not distinguishable from r. 11 of the same order for this purpose. Lewis J. in chambers in the unreported case of *Henly* v. *Evening Standard* referred to in the Annual Practice, 1948, p. 639, held (1.) that Or. 30, r. 1 (*a*), merely prescribed the time limit within which a plaintiff was required to take out a summons for directions, it did not preclude him from doing so earlier, and (2.) that, in any event, the court had an inherent jurisdiction to give directions as to the conduct of an action. If this case is not within Or. 30, r. 1 (*a*), it is

"in delivering a defence, the "plaintiff may set down the "action on motion for judgment, "and such judgment shall be "given as upon the statement "of claim the court or a judge "shall consider the plaintiff to "be entitled."

(1) [1927] 1 K. B. 231.

(2) R. S. C. Or. 30, r. 1 (*a*): "Within seven days from the "time when the pleadings shall "be deemed to be closed, the "plaintiff shall take out a "summons for directions return-"able in not less than seven "days."

a case in which the court should exercise such jurisdiction to order a trial by judge and jury to assess the damages.

SOMERVELL L.J. This interlocutory appeal arises in a libel action, and the parties to that action and the nature of the libel are irrelevant to the issue we have to decide.

The point raised is one of importance and turns on the construction of certain of the Rules of the Supreme Court. The first question is whether r. 11 of Or. 27 prescribes the only step which a plaintiff in an action covered by the rule can take when there is default in delivery of defence. That turns on the words: "The plaintiff may set down the action on motion for "judgment." Mr. Pritt submitted that the word "may" was used there because, of course, no plaintiff can be compelled to go on with the proceedings which he has started. He can do nothing. Mr. Quintin Hogg submitted that another course of procedure was open to the plaintiff, namely: the course which he took here of applying for and obtaining an order for the trial of the action before a judge and jury.

I think that that issue is concluded in Mr. Quintin Hogg's favour by the decision of this court in *Morse* v. *Frost* (1). Since that decision the rules have been revised but there has been no material alteration for the present purpose. The issue in that case arose under Or. 27, r. 4, which, as Mr. Pritt rightly pointed out, is in different terms. Rule 4 deals with the case where the plaintiff's claim is for pecuniary damages only, or for detention of goods, with or without, a claim for pecuniary damages. In that case, if the defendant makes default, it is provided that: "The plaintiff may enter an interlocutory "judgment against the defendant or defendants, and a writ "of inquiry shall issue to assess the value of the goods, and "the damages, or the damages only, as the case may be." If the plaintiff operated that part of the rule, he would, as I understand it, get an interlocutory judgment which would be what I may call an administrative matter. The rule, however, goes on: "But the court or a judge may order "that, instead of a writ of inquiry, the value and amount of "damages, or either of them, shall be ascertained in any way "which the court or judge may direct." There are no such words as those final words in r. 11. If the decision of the court in *Morse* v. *Frost* (1) had been based on the existence of those words in r. 4 it would not have covered the present case, but, as I read the judgments in that case, it was not by that process of reasoning that the Court of Appeal arrived at their decision. What had happened there was that a plaintiff, being certainly within r. 4, in the sense that he could have operated any rights which r. 4 gave him, did not do so, but gave notice for trial under Or. 36, r. 11. That rule has been altered. In 1927 there were words at the end of that rule which said that notice of trial could be given " at any time after the issues " of fact are ready for trial." Bankes L.J. in his judgment said this (1): " It is not necessary to decide whether Or. 27, " r. 13 "—I need not refer to that—" gives the plaintiff the " alternative right he claims, because I think Or. 36, r. 11, " does enable him to go before a judge and jury. That rule " provides "—then he read part of it, including the words I have just read. " In this case a statement of claim has been " delivered, but there has been no defence; so the plaintiff " may, if he likes, enter an interlocutory judgment; but he " is not bound to do that, because in my opinion, ' the issues " ' of fact are ready for trial ' within the meaning of Or. 36, " r. 11. The statement of claim raises issues which are not " disposed of. The amount of the damages is in issue, and " so are the facts on which the special damages are founded. " But even if no special damages were claimed there would " still be an issue, because, although liability is admitted " in the absence of a defence, the amount of damages is still " in dispute. The plaintiff is therefore entitled to have the " action set down for trial before a judge and a jury, and in " my opinion it should be tried before a common jury."

---

(1) [1927] 1 K. B. 231.

Atkin L.J. was of the same opinion. He said (2): " But " where damages are at stake to the very considerable amount " claimed in this action, the case may properly be tried before " a judge and jury in open court." Sargant L.J. agreed.

It seems to me that the case clearly decides that although you are within Or. 27, r. 4, you have the right under the rule dealing with notices for trial to give notice of trial and that was not by virtue of any of the later words which occur in r. 4 which do not occur in r. 11, but because the plaintiff who was within r. 4 was not confined within it; he could exercise rights other than those which that rule gave him. I think therefore that that applies and settles the first point, namely, that Or. 27, r. 11, does not exclusively provide for the rights which the plaintiff may exercise.

(1) [1927] 1 K. B. 231, 234. (2) Ibid. 235.

C. A.

1949

NAGY v. CO-OPERATIVE PRESS LD.

Somervell L.J.

Mr. Pritt next submitted that the words on which the court proceeded in saying that the plaintiff could give notice of trial do not now occur in the present Or. 36, r. 11, or r. 11 A. I agree that that is so, but I think that before one gets to that point it is necessary to consider Or. 30, r. 1 (*a*) on which Mr. Pritt also based an argument. He said that there was no jurisdiction in the master to hear an application by the plaintiff by a summons for directions because Or. 30, r. 1, provides: "Within seven days from the time when the "pleadings shall be deemed to be closed, the plaintiff shall "take out a summons for directions returnable in not less than "seven days." He submitted, and Mr. Quintin Hogg agreed, that the pleadings in these proceedings cannot be deemed to be closed; Mr. Pritt submitted that the rule means that you cannot take out a summons for directions until the pleadings are deemed to be closed. I do not take that view. The rule does not say that, if the pleadings are not closed by the default of the defendant, the plaintiff cannot apply for a summons for such directions as are appropriate to the position which has arisen as the result of the defendant's inaction. It does not say that. There are plain indications in *Morse* v. *Frost* (1) that a plaintiff who is claiming damages ought to be entitled, if he so desires, to have his action set down for trial before a judge and jury. That is what I may call the general position in cases of this kind. I would be loth to construe a rule, unless of course the words were plain, in a way which would shut out a plaintiff from taking advantage of the procedure which the rule clearly intended to give him and I do not so construe the rule. If I am wrong on that construction, I think I should have come to the conclusion (though it is not necessary to decide it) that in the circumstances which have arisen here, the plaintiff would be entitled to issue, and the court would have inherent jurisdiction to entertain, a summons (which would not be on this view the summons for directions contemplated by these rules) for trial by judge and jury, and further that the court would have inherent jurisdiction to consider whether the plaintiff should be entitled to have the issue outstanding as to damages determined as it was in *Morse* v. *Frost* (1) by judge and jury.

That I think disposes of the issues that have been raised. It is agreed that this action being a King's Bench action to be tried in London, we are not concerned with Or. 36, r. 11.

(1) [1927] 1 K. B. 231.

The order that has been made on the summons provides for the time for setting down the action. The plaintiff can set down the case under that order, which I think he was entitled to apply for and obtain. No further matter remains outstanding for this court to deal with.

I should perhaps add that Mr. Pritt said he was basing himself solely on the question whether an order could be made under the jurisdiction conferred by the rules. If there was jurisdiction to make such an order, he was not submitting or suggesting he had any grounds on which he could ask this court to interfere with the discretion exercised by the learned judge. For these reasons in my opinion, the appeal must be dismissed.

COHEN L.J. I am of the same opinion. Order 27, r. 11, seems to me to be in its natural meaning permissive. I think the purpose of the rule was to provide a cheap method for the plaintiff to obtain in most cases the relief he seeks. But circumstances might well arise in which a real hardship would be inflicted on a plaintiff if he was compelled to proceed by a motion for judgment and could not exercise the right which he would otherwise have had of setting down the case for trial and letting it come on for trial in the usual way. For instance, some of the relief he sought might be relief of a kind which it was not the practice of the Chancery Division to give on motion for judgment, such for instance as a declaration as to the construction of a document (see per Lord Maugham and Lord Russell in *New Brunswick Ry. Co.* v. *British and French Trust Corporation, Ld.* (1)). That case is a long way from the present case, but it does seem to me to indicate that there may be circumstances in which real hardship would be inflicted on a plaintiff, if he could not pursue the alternative remedy of setting down the case for trial in the usual way, and may explain why the word "may," which is deliberately permissive, has been used in the terms of Or. 27, r. 11.

I do not think I can usefully add anything more; I agree entirely with the reasons given by my Lord for thinking that we are bound by authority to decide that Or. 27, r. 11, is permissive in character and that either under the rule itself, if we accept Mr. Quintin Hogg's construction, or under Or. 30, r. 1, or under the inherent jurisdiction of the court there was

---

(1) [1939] A. C. 1, 22, 28.

C. A.

1949

NAGY
v.
CO-OPERATIVE
PRESS
LD.

power to make the order which the master made and which Birkett J. has confirmed in this case.

I would add that some authority seems to me to be derived for that view from the unreported case of *Henly* v. *Evening Standard* which is referred to in the note to Or. 36, r. 11, in the Annual Practice, 1948, p. 639. For these reasons I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.; Jacobson, Ridley & Co.*

B. A. B.

Applied. WHITTY *v.* SCOTT-RUSSELL. [1950] 1 All E.R. 884.

Followed. COURT *v.* ROBINSON [1951] 2 K. B. 60

Considered. WHITTY *v.* SCOTT-RUSSELL [1950] 2 K. B. 32

C. A.

1949
Feb. 17.

Bucknill, Evershed and Denning L.JJ.

WOLFE *v.* HOGAN.

Landlord and tenant—Rent restriction—Premises let—User contemplated that of a shop—Subsequently, in fact, used by tenant partly as residence—Knowledge of landlord—Acceptance of rent—No full knowledge by landlord of user—No acceptance of changed position—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.

Action brought in High Court—Costs—Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2.

On the issue whether premises of which possession is sought by a landlord are " let as a separate dwelling," within the meaning of s. 12, sub-s. 2, of the Rent and Mortgage Interest (Restrictions) Act, 1920, it must be shown by the tenant prima facie, that the two parties to the contract have on the one hand let, and on the other taken, the premises as a separate dwelling. That may be shown by the terms of the original letting, or it may be shown where the tenant has altered, subsequently to the original letting, the user of the premises to that of a separate dwelling, with the full knowledge of the landlord, by the landlord having accepted the changed position, so that the court must again imply a mutual consensus of the two parties to the contract in regard to the user (whether or not there had been in the original letting a prohibition against that use).

Where the terms of the tenancy provide for or contemplate the user of the premises for some particular purpose, that purpose will prima facie be the essential factor. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because someone lives on the premises. If, however, the tenancy agreement contemplates no specified user, then the actual user of the premises at the time when possession is sought by the landlord, must be considered.

Per Denning L.J.: If the lease contains an express provision as to the purpose of the letting, it is not necessary (in the absence of a subsequent full agreement) to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. If, on the other hand, it was constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is not a question of implied terms; but of the purpose for which the premises were let.

The mere acceptance of rent by the landlord from the tenant, after he had knowledge of the change of user by the tenant, though it continues for some time, does not, by itself, constitute such acceptance by the landlord of the changed position as to show that the house has been let as a separate dwelling.

On the facts proved in this case where the user contemplated at the time of the letting was that of a shop only, it was held that though the user had in fact been changed partly to that of a dwelling and partly to that of a shop, there was not such full knowledge by the landlord and acceptance of the changed position as to show that the premises had been subsequently let as a separate dwelling.

Observations of Salter J. in *Gidden* v. *Mills* [1925] 2 K. B. 713, 722, of Scrutton L.J. in *Barrett* v. *Hardy Brothers* (*Alnwick*) *Ld.* [1925] 2 K. B. 220, 227, and of Bankes L.J. in *Epsom Grand Stand Association Ld.* v. *Clarke and Wife* [1919] W. N. 170, 171, considered.

Held, further, that as the proceedings were not brought to recover possession of a dwelling-house to which the Rent Restriction Acts applied, but of a shop, s. 17, sub-s. 2, of the Act of 1920 had no application and the plaintiff was entitled to costs.

APPEAL from a judgment of Stable J. in an action by a landlord claiming the recovery of possession of premises.

In August, 1939, Mr. Noller a tenant of No. 15, Anderson Street, Chelsea, sub-let to Miss Hogan (hereinafter named the "tenant"), a large room on the ground floor, divided by means of two folding doors and, behind that, a small brick-built edifice attached to the larger room. The large room, when let, contained a number of articles of furniture and junk, Mr. Noller being a dealer in such articles elsewhere. It was plain that the tenant's intention was to carry on the business of an antique and junk dealer at this shop. No water was laid on to these rooms and there was no sanitary convenience. Mr. Noller arranged with his other tenants upstairs that his tenant Miss Hogan could have the use of their lavatory and bathroom, which was on a half way floor. Evershed L.J. in the Court of Appeal found that this was a mere privilege arranged for the tenant by Mr. Noller and not the subject of a demise. It was found by the trial judge that there was no express covenant by the tenant that she would not use the premises as a dwelling-house, but that the whole of the negotiations proceeded on the footing that the tenant was taking this composite room to use it as an antique shop. "I accept Mr. Noller's evidence that she told him that she was "living at a flat nearby" and he (the judge) was satisfied that if the tenant had told Mr. Noller that she contemplated —as at that time she did, in fact, contemplate—"using these "premises as a dwelling that he would have refused to let them "to her." Later, when London was exposed to air bombing, the tenant asked Mr. Noller whether he would have any objection to her sleeping on the premises, and he, feeling that she might well be in a difficulty in going home in air raids, assented to that request. In 1942, the freeholders parted with the freehold, Mr. Noller's lease came to an end and the tenant's sub-tenancy died with it, but she remained in occupation as a tenant of the freeholder. Mr. Wolfe the plaintiff was now the freeholder and the landlord of the tenant Miss Hogan.

Mr. Wolfe, the landlord, having given due notice to terminate the tenancy, and the tenant continuing in possession of the premises after the date for which notice was given, brought an action claiming possession. The tenant resisted the claim, contending that her rooms were let to her "as a separate "dwelling," within the meaning of s. 12, sub-s. 2, of the Rent and Mortgage Interest (Restrictions) Act, 1920. It was proved that for some time, at any rate, Miss Hogan lived in the rooms as well as conducting her business there. Mr. Noller and Mr. Wolfe denied that they knew that she was living there, but this was contested. There was no evidence of the knowledge of Mr. Wolfe's father who, before Mr. Wolfe, was her landlord for a period.

Stable J. found that there was merely a letting of premises described as a shop and held that there should be implied in the contract a covenant against the use of the premises otherwise than as a shop. Accordingly, he gave judgment for the plaintiff for possession with costs. The defendant appealed.

C. A.

1949

WOLFE
v.
HOGAN.

S. Magnus for the defendant. There was no justification here for implying in the contract made between Mr. Noller and Miss Hogan, the tenant, a covenant against the use of the premises otherwise than as a shop. There was no such express covenant and no such implied covenant. The premises let were a large front room, then containing antiques and furniture and a brick-built edifice attached. There was no exclusive letting of these premises as a shop. In *Gidden* v. *Mills* (1), Salter J. said: " Where premises are let to a tenant " on such terms that he is free to use them as a dwelling-house, " or not, as he pleases "—that it is submitted was the case here—" it is impossible to say from the terms of the tenancy " whether the premises are 'let as a dwelling' or not. In " such a case regard must be had to the user which is being " made of the premises by the tenant or sub-tenant then in " occupation at the time when possession is sought to be " obtained. If they are being used as a dwelling they are " 'let as a dwelling,' and no order or ejectment can be made " except in circumstances which do not exist here. It must, " I think, be added by way of qualification that the user as " a dwelling must not be a breach of any contract on which " the plaintiff in ejectment is entitled to rely. A tenant " cannot deprive his landlord of his common law rights by " breaking the contract of tenancy." If then by the terms of the letting there is no prohibition against user as a dwelling-house, then the question whether the premises are let as a separate dwelling must be answered by showing what was the user of the premises at the time when proceedings are taken.

The plaintiff Mr. Wolfe, seems to have known in 1945 and thereafter that the tenant Miss Hogan was residing on the premises and has continued to accept rent from Miss Hogan, with that knowledge. He cannot now say that the premises were not let as a separate dwelling: see *Norman* v. *Simpson* (2)

L. R. Miller for the landlord. Whether or not premises are to be regarded as business premises depends primarily on the purpose for which they were let and not upon the use to which they are put. As Scrutton L.J. said in *Barrett* v. *Hardy Bros. (Alnwick) Ld.* (3): " The important matter " is the rights under the lease, not the de facto user." Again Bankes L.J. said in *Epsom Grand Stand Association Ld.* v.

(1) [1925] 2 K. B. 713, 722.

(2) [1946] K. B. 158.

(3) [1925] 2 K. B. 220, 227.

C. A.
1949
WOLFE v. HOGAN.

Clarke and Wife (1): "If an agreement were to let premises "as a barn, the tenant, even though he lived there, could not "be heard to say that they were let as a dwelling-house." The law is well stated in the fourth edition (1949) of Megarry's Rent Acts, at p. 19: "Where the terms of the tenancy provide "for or contemplate the use of the premises for some particular "purpose, that purpose is the essential factor, not the nature "of the premises or the actual use made of them. Thus, "if premises are let for business purposes, the tenant cannot "claim that they have been converted into a dwelling-house "merely because somebody lives on the premises." See also *Alexander* v. *Adams* (2) where the tenant agreed "to take "shop, 38, Polton Street, Bennyrigg, on yearly tenancy." The tenant used two apartments at the rear of the shop, but forming part of the same premises for the purpose of a dwelling-house. It was held that the tenant had no premises let to him as a separate dwelling-house or, indeed, any kind of dwelling-house and he was, therefore, not qualified for the benefits of the Rent Restriction Acts. The sheriff did not found his decision on any implied prohibition. Mere permission to sleep on the premises to avoid going home during air raids does not contemplate the user of the premises as a dwelling-house, *Macmillan and Co. Ld.* v. *Rees* (3). If premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because someone lives in the premises: *Williams* v. *Perry* (4).

It is clear that the premises were let by the landlord Mr. Noller originally to the tenant, Miss Hogan, as a shop and not as a separate dwelling. The tenant, no doubt, at times slept there, but the landlord never accepted the changed situation, although the landlord, Mr. Wolfe, accepted rent after 1945 when he had some knowledge that the tenant was sleeping at the premises.

S. Magnus in reply. The character of the premises let is immaterial. The tenant may take premises of any kind intending to use them as a dwelling-house and if the landlord lets the premises without any kind of prohibition against their being so used, the tenant is entitled to so use them. The Editors of Law Notes (21st ed., 1948, at p. 99) put the matter thus: "In general, whether the premises fall within "the Acts must be tested by the position of the occupying

---

(1) [1919] W. N. 170, 171.

(2) (1936) Sc. L. T. (Sh. Ct.) 32.

(3) [1946] 1 All E. R. 675.

(4) [1924] 1 K. B. 936, 938.

"tenant at the time possession is claimed." *Gidden* v. *Mills* (1), and *Shooter* v. *Gaitley* (2).

The Scottish decision in *Alexander* v. *Adams* (3) was affected by the test of dominant use, now no longer law. Even if the letting is mainly for business and only to a minor degree for residence, the Rent Restriction Acts apply to the whole letting: *Vickery* v. *Martin* (4). There was no prohibition here at the time of the original letting against user of the premises as a dwelling-house. That being so, the question whether or not the house was let as a separate dwelling is determined by the user of the premises at the time when the proceedings are brought.

BUCKNILL L.J. I will ask Evershed and Denning L.JJ. to give the first and second judgments.

EVERSHED L.J. [having stated the facts of the case said that the court must approach it as though here there had been a contract in express terms for the letting by Mr. Noller to Miss Hogan of premises described as a shop, but without any express covenant or prohibition in regard to the manner of user. If the facts were that the landlord of Miss Hogan, with full knowledge of what she was doing, had continued to accept her as a tenant, he thought, prima facie, at any rate, it would be impossible for him to deny that there had come into existence a letting of a dwelling-house. But in his view that did not arise, since he could not find any sufficient ground for saying that there was here proved such full knowledge of what Miss Hogan was doing as would have justified the court in saying that there must be considered to have come into existence a letting of those premises as a dwelling-house by the assent, actual or implied, of the two parties to the letting. Such a case, in fact, was not pleaded, though it would be a pity to regard that as conclusive. He continued:] The question at issue has narrowed itself down to a point not free from difficulty and interest. The learned judge treated the contract as being in the terms I have stated, namely, merely a letting of premises described as a shop, and has come to the conclusion that there should be implied in the contract a covenant against user otherwise than as a shop. For my part, I confess I find difficulty in accepting the view that one should, in a case of this kind, imply a restrictive covenant of that nature. No doubt these lettings are very informal and it is legitimate to try to extract from the simple and informal transaction what the real intention was; but I think, as at present advised, it would need more than we have here to justify a conclusion that there was an implied covenant of which Miss Hogan could be said to be in breach. On the other hand, from the terms of the contract, as I have appreciated it, it seems to me plain that, at the time of the letting, the contemplated user—that is the user contemplated by the language that was used—was user as a shop and not as a dwelling-house. That was the user in fact contemplated by the landlord; and (whatever may have been hidden in her mind) it was the user which, from the language used, the landlord might fairly assume was contemplated also by Miss Hogan.

---

(1) [1925] 2 K. B. 713, 727.

(2) (1936) 80 Sol. Jour. 74.

(3) (1936) Sc. L. T. (Sh. Ct.) 32.

(4) [1944] K. B. 679.

I turn again to the terms of the statute s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "This Act shall apply to a house or a part of a "house let as a separate dwelling." "Let as a separate "dwelling" must refer to the subject of a contract of letting as a separate dwelling. If it is to be shown that particular premises come within that definition, prima facie, at any rate, as it seems to me, it must be shown that the two parties to the contract have let on the one hand and taken on the other the premises in question as a separate dwelling. That may be shown either by the terms of the bargain or it may be shown, where one party has altered the user with the full knowledge of the other, by that other party accepting the changed position, so that you must again imply a mutual consensus of the two parties to the contract in regard to the use. The vital fact here that I have stated is in my judgment this, that though Miss Hogan has used these premises for some time as a dwelling, the other party to the contract has had no full knowledge of that fact, and for his part has not intended or contemplated any such user. Again I refer—because I think it is important in cases of this sort—to the fact that there is apparently no sanitation or water supply to these premises and, therefore, they are physically far from suitable for use as a dwelling-house. That is a fact which I think must be borne in mind. That, however, is not an end of the matter, because the case put on behalf of the appellant by Mr. Magnus

C. A.

1949

WOLFE *v.* HOGAN.

Evershed L.J.

is based upon the argument that there is here no implied covenant—and I assume that part of his argument, as I have said, in his favour—and, therefore, he bases himself on the decision in *Gidden* v. *Mills* (1), to which I will refer. He says that the right statement of the relevant law is this: if by the terms of the lease itself there is no prohibition against user as a dwelling-house, then the question: Are these premises let as a dwelling? has to be answered by reference to the fact of user at the time when the proceedings are taken, although that user may be quite unknown to the other party to the contract. I think Mr. Magnus has to go that far. He has indeed conceded that his argument takes him that length. In *Gidden* v. *Mills* (1), the subject matter there in question was described in the relevant lease as follows; "All that piece "of ground . . . . with the coach house and stable erected "thereon which said described premises are now known as "No. 6, Galen Place, Bloomsbury." Then there followed certain restrictive covenants. One was that no sale by auction should take place on the premises, and then there was a fairly elaborate covenant against users of a particular kind as "for a madhouse, billiard room, or public concert, "music or ballroom, shooting gallery, or as or for a brothel, "or as for a foundry, hospital, infirmary," and there are set out various other types of use and occupation which were barred. That undoubtedly left it quite free for the tenant to use the premises in any other way he liked, and he was given a very large realm of choice. I further observe from the way in which the premises are described, that there is no letting for a purpose which was in terms contemplated at the time. What happened was that the premises were used at the relevant date, namely, when the action came to be tried, in part as a garage, and in part as a dwelling for the tenant's chauffeur. The question was: Were these premises within the Act at all? The actual decision is unimportant for the present case, but the passage on which Salter J. founded himself has been greatly relied upon by Mr. Magnus, and I must read it. He said (2): "Where premises are let to a "tenant on such terms that he is free to use them as a dwelling-"house, or not, as he pleases, it is impossible to say from the "terms of the tenancy whether the premises are 'let as a "'dwelling,' or not. In such a case regard must be had "to the user which is being made of the premises by the

---

(1) [1925] 2 K. B. 713.

(2) Ibid. 722.

C. A.

1949

WOLFE v. HOGAN.

Evershed L.J.

"tenant or sub-tenant then in occupation at the time when "possession is sought to be obtained. If they are being used "as a dwelling they are 'let as a dwelling,' and no order in "ejectment can be made except in circumstances which do "not exist here. It must, I think, be added by way of "qualification that the user as a dwelling must not be a breach "of any contract on which the plaintiff in ejectment is entitled "to rely. A tenant cannot deprive his landlord of his common "law rights by breaking the contract of tenancy." What Mr. Magnus founds on that by way of argument is this: He says, as I have already indicated, that that passage means "unless there is a prohibition, then the question of user in "fact at the material time by the tenant is the decisive factor." I have come to the conclusion that that is not a complete statement of the law.

We have been referred to several cases, and I hope I shall not be thought to be disrespectful to the learned counsel who have argued the case if I do not refer to all of them, because I do not find any other case which really covers the present point or throws any greater light upon it than the one I have read, save certain observations by Bankes L.J., and by Scrutton L.J. which, although in a rather different context, have been referred to as throwing some light upon the proper principle to be applied. Those statements are set out by the editors of the Law Notes book on the Rent Acts, which is commonly used in cases of this kind, and I think it may be convenient if I read a short passage from that book (21st ed.). The editors cite this observation from the judgment of Scrutton L.J. on p. 109: "The important matter is the "rights under the lease, not the de facto user," and the authority for that is *Barrett* v. *Hardy Brothers* (*Alnwick*) *Ld.* (1). Then comes a quotation from the judgment of Bankes L.J. in *Epsom Grand Stand Association Ld.* v. *Clarke* (2): "If an "agreement were to let premises as a barn the tenant, though "he lived there, could not be heard to say that they were let "as a dwelling-house." Then over the page the editors refer to *Gidden* v. *Mills* (3), and they seem to indicate some doubt whether the principle as stated by Greer J. (by which I think is meant that found by Mr. Magnus in the judgment of Salter J.), is now accepted as correct, and they suggest, I think, a preference for the statement of Bankes L.J.

(1) [1925] 2 K. B. 220, 227.

(2) [1919] W. N. 170.

(3) [1925] 2 K. B. 713.

Observations of the kind referred to must always be read in the light of the particular cases which come before the judges responsible for them. I hope I shall not be thought guilty of any disrespect to Bankes L.J. if I observe that the statement quoted from his judgment is incomplete, as I think, in so far as there is no indication that the user by the tenant is one which is or is not known to or accepted by the other party to the contract, namely, the landlord. I think, if I may say so, that the matter is more accurately stated by Mr. Megarry in the fourth edition of his book on the Rent Acts, and I quote and adopt as part of my judgment the brief summary of the position which I find on p. 19 of his book: "Where the terms of the tenancy "provide for or contemplate the use of the premises for some "particular purpose, that purpose is the essential factor, "not the nature of the premises or the actual use made of "them. Thus, if premises are let for business purposes, "the tenant cannot claim that they have been converted into "a dwelling-house merely because somebody lives on the "premises." Then he refers to the two passages from the judgments of Scrutton L.J. and Bankes L.J., and a little later on he writes: "If, however, the tenancy agreement "contemplates no specified use, then the actual use at the time "when possession is sought by the landlord must be considered," and then various instances are given. I may add that in such a case, the lease being quite silent, plainly one cannot get any help from the terms of the lease on the question whether the premises were or were not let as a dwelling, and you have to find the answer to the question by reference to the facts as they have occurred. Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that if a tenant does change the user and creates out of what was formerly a shop a dwelling-house, and if that fact is fully known to and accepted by the other party to the contract, whether or not there is a prohibition, the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed.

But, as I have already said, these facts do not arise here. What does arise here is plainly, I think, a contemplation, according to the terms and circumstances of the letting, of user as a shop. I do not forget, as the learned judge said, that Miss Hogan in the recesses of her mind was intending and contemplating a user of a different kind. But this is a matter of contract, and the terms of the bargain, as the learned judge found them, and the intention of Mr. Noller, the landlord, as expressed by him, and believed by the learned judge, make it impossible to say that, at the date of the letting, there was any user contemplated other than as a shop. As I think there has been nothing since occurring which has altered that position in fact, in my judgment, the result is that in this case, as the learned judge himself concluded, though perhaps on somewhat different grounds, the defendant, Miss Hogan, has failed to establish her case that the premises in question come within the ambit of the protection of the Rent Restriction Acts.

I would add that there is no English case, so far as we know—and the industry of counsel has been quite considerable—which is a direct authority for a case where there is a mere "contemplation" from the terms and circumstances of a lease as opposed to an express prohibition. But Mr. Megarry cites a case which was a decision of the sheriff and the sheriff substitute in Scotland in the year 1936 of *Alexander* v. *Adams* (1). I think it may possibly be said of the judgment of the sheriff substitute, that he was construing the terms of the letting (which were simply that the landlord let a particular shop, so described, to the tenant), as containing something like a prohibition against any other user; but the sheriff on appeal did not, I think, found himself on any finding of an implied prohibition. Therefore, for my part, I respectfully agree with the decision of the sheriff in that case, which I think is in conformity with the intention of the Act and the meaning of the relevant sub-section. For these reasons, I think that this appeal fails.

DENNING L.J. In determining whether a house or part of a house is "let as a dwelling" within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used

(1) (1936) Sc. L. T. (Sh. Ct.) 32.

C. A.

1949

WOLFE
v.
HOGAN.

Denning L.J.

as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let.

These premises were let in 1939 by the head lessee to Miss Hogan. On the facts, there was ample material on which the judge could find that the purpose of the letting was for use as a shop. At the beginning of the tenancy, therefore, the premises were not within the Act. But the point that has arisen in the course of the argument is this: What is the effect of the tenant changing the use she made of the premises? She changed its use from one for business purposes to one partly for business and partly for dwelling purposes. During the air-raids in 1940 she started to sleep on the premises and continued to sleep there. She has thereafter continued to use a part for dwelling purposes. Indeed, when the notice to quit was given in 1947, she was for all practical purposes permanently residing in the back part of the room. Moreover, there is ground for supposing that the landlord accepted rent, knowing of the change of user: because, in 1942, after the original letting to the head lessee under the lease had come to an end, the head landlord became the immediate landlord of Miss Hogan and, knowing the position of affairs in the house, accepted rent from her.

What is the effect of that? In my opinion, it does not give the tenant the protection of the Act. A house or a part of a house originally let for business purposes does not become let for dwelling purposes, unless it can be inferred from the acceptance of rent that the landlord has affirmatively consented to the change of user. Let me illustrate that from the common law doctrine as to waiver of forfeiture. A breach of covenant not to use premises in a particular way is a continuing breach. Any acceptance of rent by the landlord, after knowledge, only waives the breaches up to the time of the acceptance of rent. It does not waive the continuance of the breach thereafter and, notwithstanding his previous acceptance of rent, the landlord can still proceed for forfeiture on that account. Indeed in the case of a continuing breach, the acceptance of rent, after knowledge, is only a bar to a claim for forfeiture if it goes on for so long, or is accepted in such circumstances, that it can be inferred that the landlord has not merely waived the breach, but has affirmatively consented

C. A.
1949
WOLFE
v.
HOGAN.
Denning L.J.

to the tenant continuing to use the premises as he has done. (See notes to *Dumpor's* case in the Smith's Leading Cases (13th ed.), vol. 1, at pp. 48 and 49.)

A breach of covenant not to sub-let, however, is not a continuing breach, at all events so long as the under-lease cannot be determined. It is a single breach which can be waived by acceptance of rent with knowledge. Accordingly, it has been held that, if a contractual tenant sub-lets without consent in breach of covenant, it may become a lawful sub-letting by acceptance of rent with knowledge. (See *Norman* v. *Simpson* (1) and *Watson* v. *Saunders-Roe Ld.* (2).) But I would point out that in the later case of *Oak Property Company Ld.* v. *Chapman* (3), where a statutory tenant sub-let without consent, this court held that the mere acceptance of rent after knowledge was not by itself sufficient, and said that there must be conduct by the landlord which is equivalent to a consent by him to the continuance of the state of affairs created by the tenant in order that the sub-letting should become a lawful sub-letting.

By parity of reasoning in this case, the mere acceptance of rent by the landlord, although it went on for some time—indeed, for four or five years—was not itself any assent to the change of user. Even if he had made no protest, it would not itself be an assent, but, in fact, from the very earliest times in 1942 there were letters of protest which clearly negatived any assent. The acceptance of rent has no effect in a case of this kind so as to alter the premises into controlled premises, unless it can properly be inferred, as a matter of fact, that the landlord has affirmatively assented to the change of user and to it becoming let in whole or in part as a dwelling-house. That cannot be inferred here. The second point for our consideration, therefore, also fails.

I agree that this appeal should be dismissed.

BUCKNILL L.J. I also agree.

S. Magnus for the defendant: The county court had jurisdiction in this case. See s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. These proceedings should have been brought in or remitted to the county court. By s. 17, sub-s. 2: " . . . . if a person takes

---

(1) [1946] K. B. 158.
(2) [1947] K. B. 437.
(3) [1947] K. B. 886.

" proceedings under this Act in the High Court which he " could have taken in the county court he shall not be entitled " to receive any costs." Accordingly the trial judge should not have granted the plaintiff her costs. [*Russoff* v. *Lipovitch* (1); *A. J. Smith Ld.* v. *Kirby* (2); and *Lee* v. *Carter Ld.* (3) were cited.]

BUCKNILL L.J. In my judgment the trial judge was right in his conclusion, that s. 17, sub-s. 2, of the Act of 1920 did not apply to this case. For that sub-section to apply, it must be established that the proceedings are in respect of a dwelling-house to which the Rent Restriction Acts apply. The defendant here failed to establish that these premises were a dwelling-house. Atkin L.J. in *Russoff* v. *Lipovitch* (4), said on this point as to how far sub-s. 2 of s. 17 applies: " The " result appears to me to be that the legislature intentionally " increased the jurisdiction of the county court so as to allow " of its dealing with all questions relating to the recovery " of possession of houses to which the Rent Restrictions " Act applies." This was not a question relating to the recovery of the possession of a house to which the Rent Restriction Acts applied; it related to the recovery of the possession of a shop. For these reasons, I think the decision of the trial judge was right.

EVERSHED L.J. I agree.

DENNING L.J. I agree.

Appeal dismissed.

Solicitors for the defendant: *Frederick Wills & Co.*
Solicitors for the plaintiff: *Barnes and Butler.*

(1) [1925] 1 K. B. 628.
(2) [1947] 1 All E. R. 459.
(3) [1949] 1 K. B. 85.
(4) [1925] 1 K. B. 628, 640.

C. G. M.

1949
Apr. 26 ;
May 6.

Lord Goddard C.J., Birkett and Lynskey JJ.

MARSH *v.* MOORES (J.)

MARSH *v.* MOORES (P.)

Road traffic—Motor vehicle—Insurance—Third party risks—Owner of vehicle covered against legal liability—Unauthorized act by authorized driver in course of employment—Delegation of driving to unlicensed learner—Policy in force in relation to user of vehicle—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35.

Informations were preferred against the respondents, J. M. and P. M., in the case of the former for permitting a motor-car to be used on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third party risks as complied with the requirements of the Road Traffic Act, 1930, and in the case of P. M., for having used the motor-car on the road on the same date and in the like circumstances. The car was the property of a company of which J. M.'s father was the managing director and, on the material day, J. M. was the duly appointed driver of the vehicle on a journey undertaken on the instructions of his father and, with the knowledge and permission of the latter, he was accompanied by P. M., a girl of seventeen. J. M. was in possession of a current driving licence but P. M., to his knowledge, had no driving licence and was unable to drive. While the vehicle was on the road, J. M. allowed P. M. to take the wheel and, while the vehicle still proceeded on the route of its authorized journey, and he was sitting beside her ready to operate the hand brake, he gave her a lesson in driving. Shortly afterwards the car was overtaken by a police car and it was then ascertained that P. M. was not the holder of a driving licence. The car was insured by the company in respect of third party risks for the purposes of the Road Traffic Act, 1930, "against all sums which the insured shall become "legally liable to pay" and, by an exception clause, the insurance company were exempted from liability if the vehicle insured was "being driven with the general consent of the insured by any "person who to the insured's knowledge does not hold a licence "to drive such a vehicle unless such person has held and is not "disqualified for holding or obtaining such a licence." The justices were of opinion that in the circumstances there was in force in relation to the user of the vehicle such a policy of insurance as complied with the requirements of the Road Traffic Act, 1930, and dismissed the charges. The prosecutor appealed.

Held, (1.) that s. 35, sub-s. 1, of the Road Traffic Act, 1930, did not require that there should be a policy of insurance in existence covering the personal liability of the driver of the vehicle if there was already a policy in respect of third party risks covering the user of the car at the material time ; (2.) that J. M. was the servant of the company and, as such, was entrusted by them with the control, management and driving of the car on the day in question. In allowing P. M. to drive the car he was doing

1949

MARSH
v.
MOORES (J.)
MARSH
v.
MOORES (P.)

an unauthorized act, but one within the scope of his authority, and if an accident had occurred to a third party owing to the negligent driving of P. M., he would have been, at least in part, responsible and his employers would, in turn, be legally responsible vicariously for the negligence of their servant acting within the scope of his authority and would be entitled to be indemnified under their insurance policy; and (3.), that the insurance company were not relieved of their liability to indemnify the company by the exception to the policy, since P. M., who did not hold a licence, was not driving with the knowledge or consent of the company. The decision of the justices was, therefore, right.

CASES stated by justices.

In the first case the appellant, W. F. Marsh, a superintendent of police, preferred an information under s. 35, sub-s. 1, of the Road Traffic Act, 1930 (1), against John Moores, for that he on August 30, 1948, at Plumpton Head, in the parish of Hesket, did permit a private motor-car, FKD 14, to be used on the road without there being in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complied with the requirements of the Road Traffic Act, 1930. In the second case an information was preferred against Patricia Moores charging her with having used the motor-car on the same date and at the same time and in the like circumstances.

The facts proved or admitted before the justices on the hearing of the informations were as follows: A Morris 10 h.p. motor-car, registered number FKD 14, was the property of Littlewoods Mail Order Stores Ld. of Liverpool and was duly registered and licensed in the name of the company. J. Moores, the first respondent, was in the employ of the company of which his father was the managing director. On August 30, 1948, John Moores was the duly appointed driver of the vehicle in question on a journey undertaken for social purposes on the instructions of his father as managing director of the company. With the knowledge and permission of his father, he was accompanied on the journey by his cousin, Patricia Moores, the respondent to the second information.

(1) Road Traffic Act, 1930, s. 35, sub-s. 1: "Subject to the "provisions of this part of this "Act, it shall not be lawful for "any person to use, or to cause "or permit any other person to "use, a motor vehicle on a road "unless there is in force in "relation to the user of the "vehicle by that person or that "other person, as the case may "be, such a policy of insurance "or such a security in respect "of third-party risks as complies "with the requirements of this "part of this Act."

John Moores was in possession of a current driving licence but Patricia Moores, who was seventeen years of age, was not in possession of and had not been issued with a motor-car driving licence, which fact was known to John Moores. While the vehicle was on the highway at Plumpton Road, John Moores, on his own initiative, allowed his cousin to take the wheel and, while the vehicle still proceeded on the route of its authorized journey, and while he was sitting beside her ready to operate the hand brake, he gave her a lesson in driving the vehicle along the highway. Shortly after the lesson had begun, the vehicle was overtaken by a mobile police patrol and ordered to pull up. It was then ascertained that Patricia Moores was driving while not being the holder of a driving licence. For the purposes of the Road Traffic Act, 1930, the company were insured in respect of the use of the vehicle with the Palatine Insurance Co. Ld. By the policy, the company were covered in respect of the motor vehicle (inter alia) for liability to third parties. The terms of this cover were : " The company will indemnify the insured " in the event of accident caused by or through or in connexion " with any motor-car described in the schedule hereto . . . . " against all sums including claimants' costs and expenses " which the insured shall become legally liable to pay in " respect of (I.) death or bodily injury to any person . . . ." The vehicle, FKD 14, was one of the vehicles described in the schedule to the policy. By a further clause in the policy it was provided that " in terms of and subject to the limitations " of and for the purposes of this section (I.) the company " will indemnify any person who is driving such motor-car " on the insured's order or with his permission provided . . . . " (*c*) that such person holds a licence to drive such motor-car " or has had and is not disqualified for holding or obtaining " such a licence."

A general exception to the cover given by the policy provided that the company shall not be liable " in respect of (I.) : " any accident, injury, loss, damage and/or liability caused, " sustained or incurred while any motor vehicle in respect " of or in connexion with which insurance is granted under " this policy is . . . . (*c*) being driven with the general " consent of the insured by any person who to the insured's " knowledge does not hold a licence to drive such vehicle " unless such person has held and is not disqualified for holding " or obtaining such a licence." The description of use contained in the policy was: "Use for social, domestic and "pleasure purposes and use for the business of the insured "as stated in the schedule hereto."

The justices were of opinion (1.) that the wrongful act of John Moores in allowing Patricia Moores to drive was done without the knowledge or permission of his employers but was an act done in the course of his employment, and while Patricia Moores was driving, the use of the vehicle on its journey still continued; (2.) that the first respondent was at all material times aware that Patricia Moores was unlicensed; (3.) that at the material time the company were protected by insurance in respect of the use of the vehicle on the journey in question; and (4.) that in the circumstances there was in force in relation to the user of the vehicle such a policy of insurance as complied with the requirements of the Road Traffic Act, 1930. They accordingly dismissed the charges.

The prosecutor appealed.

C. Q. Henriques for the appellant. The justices were wrong in holding that the use of the vehicle on the day in question was covered by the owners' insurance policy and consequently that there was in force in relation to the vehicle such a policy as complied with s. 35 of the Road Traffic Act, 1930. John Moores was given permission to drive the car for a social purpose, but the driving of it was no part of his employment by the company. In allowing his cousin to drive, he was doing something entirely unconnected with, and outside the scope of his employment, for which his employers could not be liable. In sitting by the side of the girl in the car, he was not retaining any real control over the vehicle and if there had been an accident while Patricia Moores was driving, the owners of the car would not be legally liable and therefore entitled to be indemnified by the insurance company. Consequently the car was being used without a policy of insurance being in force in relation to such user and the respondents should have been convicted of the offences with which they were charged.

G. G. Blackledge for the respondents. The decision of the justices was right. J. Moores, the male respondent, was instructed by his father, the managing director of the company by whom his son was employed, to drive the vehicle belonging to the company between two points on the highway. He was driving the car on behalf of the company and, although his cousin was travelling as a passenger with the knowledge of the managing director, J. Moores had no authority to allow her to drive. He knew that she had never driven before, and that she had no licence and no skill in driving and, his act, in allowing her to drive was in itself an act of continuing negligence. The facts are similar to those in *Ricketts* v. *Thomas Tilling Ld.* (1), and it is not possible to conceive of an accident occurring owing to the negligent driving of the female respondent, for which the male respondent would not have been held, at least in part responsible.

As the vehicle was still being driven on the authorized route for the company's purposes, the negligence of J. Moores in allowing his cousin to drive was an act committed within the scope of his employment, and the company would be liable at law in respect of any accident to a third party which occurred while he was sitting by the female respondent, near the controls, and instructing her how to drive. If the company would be legally liable, the risk was one which was covered by their policy and they were, therefore, insured in respect of the use of the vehicle on the highway at the material time. It was decided in *John T. Ellis Ld.* v. *Hinds* (2), that s. 35 of the Road Traffic Act, 1930, does not require that there shall be a policy in force covering the liability of the actual driver, provided that there is a policy in existence covering the particular use of the vehicle at the time of the accident. That was the case in the present instance and the liability of the insurance company to indemnify the owners of the vehicle, would not be excluded by any of the general exceptions to the policy.

Cur. adv. vult.

May 6. LORD GODDARD C.J. I will ask Lynskey J. to give the first judgment.

LYNSKEY J. read the following judgment, which, after stating the facts, continued: The contention of the appellant in both cases was that the respondent, Patricia Moores, was driving and using the vehicle at the material time without the permission or the knowledge of the company, and that the respondent, John Moores, had no authority from the company to permit, as he did, the said Patricia Moores to drive the vehicle. In these circumstances, there would be

(1) [1915] 1 K. B. 644.

(2) [1947] K. B. 475.

no legal liability on the part of the company if third parties were injured as the result of her negligence, and the company's policy of insurance would not cover liability to such third parties. Further, the policy would not by its extension of cover operate to indemnify Patricia Moores as she was not driving the vehicle with the permission of the company and in any event did not hold a licence to drive such a motor and had not held such a licence as required by the conditions of the extension of cover.

On the part of the respondents it was contended that although it might be that the company were not liable for the negligence of Patricia Moores in causing injury to third parties, they were liable for the negligence of their servant, John Moores, in the driving, management and control of the vehicle, and that if he permitted a driver whom he knew to be inexpert to drive the vehicle whether under his supervision or not, that was a negligent act within the scope of his employment for which his employers would be liable. In such a case it was said the company's policy of insurance would cover their liability to third parties, and was a policy sufficient to comply with the requirements of the Road Traffic Act, 1930, although the personal liability of Patricia Moores was not covered by a policy of insurance.

The first question raised by these contentions is: What is the true construction of s. 35, sub-s. 1, of the Road Traffic Act, 1930? Does that section require that there should be a policy of insurance in force which covers the personal liability of the driver, or is it sufficient that there should be a policy in force covering the then user of the car in respect of third party risks? This question was considered by this court in *John T. Ellis Ld.* v. *Hinds* (1). In that case the appellants were the owners of a motor vehicle which was driven by their servant, MacDonald, a boy under the age of seventeen years who did not hold and, because of his age, could not obtain a driving licence. The motor vehicle came into collision with a motor omnibus while being driven by this boy. The appellants were summoned for unlawfully permitting the use of the vehicle on the road when there was not in force in relation to the user of the vehicle by the person using it a policy of insurance complying with the Road Traffic Act.

In that case, the appellants had no knowledge of the boy's age or of the fact that he held no driving licence. The

---

(1) [1947] K. B. 475, 487.

1949

MARSH v. MOORES (J.) MARSH v. MOORES (P.)

Lynskey J.

appellants held a policy of insurance which did not cover the personal liability of the boy to third parties but did cover the liability of the appellants to such third parties while the boy was driving their vehicle. The appellants were convicted before the justices, but, on appeal by way of case stated, this court held that s. 35, sub-s. 1, of the Road Traffic Act, 1930, did not require that there should be in force a policy which covered the driver's liability, and that if at the material time the owners of the vehicle were within the cover of the policy in respect of the driving of the vehicle by the boy, there would be a policy in force in relation to the user of the vehicle by the boy driver, and therefore that no offence had been committed by the appellants.

In his judgment in that case, Humphreys J. said: "The "reason, as I think, is that it is not any particular person "who uses who is required by s. 35 to be insured; what is "required is that the use on the road by the person or persons "in fact using, should be covered by insurance in respect "of third-party risks. In the present case, the appellants, "as the owners, had a policy which indemnified them against "any liability which might be incurred by them in respect "of death or bodily injury to any person, arising out of the "use on the road of the vehicle. That policy was, therefore, "one which complied with the requirements of s. 36, sub-s. 1, "of the Act. The contention of Mr. O'Malley is that something further is required by s. 35, namely, an insurance "indemnifying the driver, MacDonald. I find nothing in "the section to support that contention. I think the true "view of the section is that what must be covered by insurance "in respect of third-party risks is the use on the road of the "vehicle by the driver. Upon the facts stated in the case, "McDonald was driving the vehicle as the servant of the "appellants, and was acting in the scope of his authority. "The appellants, therefore, were plainly liable for the consequences of any negligence displayed by McDonald in "the course of his driving."

As a result of this decision, the question we have to consider in these cases is not whether Patricia Moores or John Moores was insured in respect of her or his personal liability, but whether, if a third party had sustained injuries as a result of the user of the car in the circumstances set out in the cases, such third party could have recovered damages in respect of such injuries from the company and whether the company were indemnified in respect of such damages under their policy of insurance.

John Moores was a servant of the company and as such was entrusted by the company with the control, management and driving of the vehicle in question on August 30, 1948. It is well settled law that a master is liable even for acts which he has not authorized provided that they are so connected with the acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible for, in such a case the servant is not acting in the course of his employment but has gone outside it (see *Booth* v. *Mister* (1); *Beard* v. *London General Omnibus Co.* (2); *Canadian Pacific Ry.* v. *Lockhart* (3)).

In the course of the argument we were referred to *Ricketts* v. *Thomas Tilling Ld.* (4). That case was an example of the application of these principles. In that case the driver of a motor omnibus allowed the conductor to drive the omnibus. The driver was sitting next to the conductor and could see what the latter was doing and he could control what was going on. Phillimore L.J. stated: "The question really "is, was the driver still in charge of this omnibus, and did "the accident happen because he neglected his duty," and Pickford L.J. summarizes the position in these words: "It "seems to me at any rate that there is evidence of negligence "on his part, he being there and still having the duty of the "controlling and the driving of the omnibus, in allowing "the omnibus to be negligently driven whereby the accident "happened." In that case, the only question before the court was whether there was evidence of negligence to go to a jury, and the court held there was such evidence.

In all these cases it must be a question of fact whether an unauthorized act by a servant is within the scope of his employment or outside his employment.

In the cases which we are considering, the justices have found as facts that John Moores was the duly appointed driver of the vehicle, and that while the vehicle was still proceeding on the route of its authorized journey, on his own initiative he allowed the respondent, Patricia Moores, to take

(1) (1835) 7 C. & P. 66.
(2) [1900] 2 Q. B. 530.
(3) [1942] A. C. 591, 599.
(4) [1915] 1 K. B. 644, 649, 651.

the wheel and, while sitting beside her ready to operate the hand-brake, gave her a lesson in driving the vehicle along the road.

In acting as he did, was John Moores doing an unauthorized act within the scope of his employment or an unauthorized act outside his employment? In my view, he still retained the control and management of the vehicle. He still retained some power to control the driving of the vehicle by operating the hand brake and in instructing Patricia Moores as to how she should drive. In these circumstances, it seems to me that he still remained the driver of the car and, in allowing Patricia Moores to take the wheel under his directions, he was acting within the scope of his employment, although in an unauthorized and improper way. If an injury was caused to a third party while the vehicle was being so driven, as the result of the negligent driving of the vehicle, John Moores would be at least in part responsible for such negligence, and the company, as his employers, would in turn be responsible vicariously for the negligence of their servant acting within the scope of his employment.

The final question remaining is whether the company would be entitled to be indemnified under their policy of insurance for this responsibility. By the policy, the insurance company undertake to indemnify the company in the event of an accident caused by or through or in connexion with the vehicle against all sums which the company shall become legally liable to pay in respect of the death or bodily injury to any person or damage to property. I have not quoted in full the operative words of the policy but only such words as are material to the facts of these cases. The liability of the company to third persons injured while the vehicle was being driven in the circumstances described in the cases stated are clearly covered by these words in the policy. The only relevant exception clause, (I.) (*c*), does not operate to relieve the insurance company from its liability to indemnify the company under the general cover contained in the policy. The only person driving with the general consent of the company was John Moores who held a licence to drive the vehicle and Patricia Moores, who did not hold and who had not held such a licence, was not driving with the consent of the company or with its knowledge.

In my view, the use of the vehicle on the road in the circumstances appearing in the cases was a user in relation to which there was a policy of insurance in respect to third party risks which complied with the requirements of the Road Traffic Act, 1930.

The justices were right in their decisions in these cases and these appeals should be dismissed.

LORD GODDARD C.J. I agree with the judgment which Lynskey J. has just delivered, and I add a few words only for the purpose of pointing out to justices and the police the difference between this case and that of *Reay* v. *Young and Another* (1), which was before this court earlier in the week.

In the present case, the company, who were the owners of the car, were insured under a policy which gave the widest possible cover to them. They were indemnified in the event of accident caused by or through or in connexion with the motor-car described in the schedule against all sums which the company might become legally liable to pay in respect of damage sustained by a third person. They were, accordingly, covered against any damages they might be called on to pay in respect of the negligence of a servant of theirs who was driving the car in the course of his employment quite independently of the extension clause in the policy whereby the company agreed to indemnify the driver against any liability which he personally might incur. The general exceptions have no application because no permission had been granted by the company to Patricia Moores to drive, nor could any knowledge that she was driving, or was unlicensed, be attributed to them. The question, therefore, is whether, had an accident occurred through the negligence or unskilful driving of Patricia Moores, would the company have been liable? In my opinion, they would. Her driving took place in the course of a journey which John Moores had been instructed by the company to take, and he was driving as their servant throughout. The driving of Patricia Moores took place in the course of an authorized journey and while the car was on its authorized route. If then, she had injured a third person, negligence could be attributed to the driver either because he allowed an unskilful person to drive, or because he himself did not take steps to avoid the accident. Had he departed from his route so that it could be said that he had gone off on what is usually called a frolic of his own, in the course of which he allowed Patricia Moores to drive,

---

(1) [1949] W. N. 242.

1949

MARSH v. MOORES (J.) MARSH v. MOORES (P.)

Lord Goddard C.J.

the case might well have been different, but on the facts of this case I think it amounts to a servant doing an unauthorized act but doing it during and in the course of his employment and therefore within the scope of his employment.

The case of *Reay* v. *Young* (1) was a case where a husband, who was insured, allowed his wife, who was uninsured, to drive the car, he himself being present. She was not driving as his servant. There was no question, therefore, of her driving within the scope of any employment. As the husband knew that his wife did not hold a licence, the general exceptions clause, if he held a policy in the same form as the present, would have operated to exempt the company from liability. The defendants in that case both pleaded guilty, and it is quite clear that they were right in doing so.

I agree the appeal should be dismissed.

BIRKETT J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Sherwood & Co. for G. N. C. Swift, Carlisle.*

Solicitors for the respondents: *Jaques & Co. for North, Kirk & Co., Liverpool.*

(1) [1949] W. N. 242.

P. B. D.

1949
Apr. 7.

Lord Goddard C.J., Oliver and Cassels JJ.

JENKINS *v.* HOWELLS.

Local government—Education—Failure to attend regularly at school—"Unavoidable cause"—Education Act, 1944 (7 & 8 *Geo.* 6, *c.* 31), *s.* 39, *sub-s.* 2 (*a*).

Section 39, sub-s. 1, of the Education Act, 1944, enacts that the parent of a child who fails to attend regularly at school shall be guilty of an offence, but by sub-s. 2 (*a*), the child shall not be deemed to have failed to attend regularly at school by reason of his absence therefrom " at any time when he was prevented from " attending by reason of sickness or any unavoidable cause."

A girl of school age, was continuously away from school because her mother was a chronic invalid and it was necessary for the girl to assist her with the housework at home.

Held, that that was not an " unavoidable cause " within the meaning of sub-s. 2 (*a*) of the Act. Unavoidable cause, like sickness, must be in relation to the child.

1949

JENKINS
v.
HOWELLS.

APPEAL by case stated from Carmarthenshire justices.

A girl aged fourteen was a registered pupil at a voluntary primary day school in Carmarthenshire. She failed to attend there regularly and the appellant, a school attendance officer employed by the county council, preferred an information against the girl's mother (the respondent in the appeal) under s. 39 of the Education Act, 1944 (1), in respect of her daughter's failure to attend the school regularly between July 15 and 27, 1948.

At the hearing of the information the following facts were proved or admitted: The respondent was a widow. She told the appellant that the child had to work at home because she (the respondent) was suffering from defective eyesight. The respondent had been warned twice before in respect of the child's absences.

From September 6, 1947, to July 31, 1948, the school was open for 390 sessions, of which the child missed 225. The school was two and a half miles from the child's home.

The respondent had for some years been suffering from chronic heart disease. She had been forbidden by her doctor to perform household duties. At the date of the hearing of the information she was awaiting admission to hospital for an eye operation. She had a farm of 260 acres worked by three unmarried sons. There was no one on the farm to do household duties except the respondent and her daughter, and the respondent had tried, without success, to obtain domestic help.

It was contended for the respondent that no offence had, in the circumstances, been committed.

The justices held that the facts proved constituted an "unavoidable cause" within the meaning of s. 39, sub-s. 2 (*a*) of the Education Act, 1944, and dismissed the information.

The appellant appealed.

---

(1) Education Act, 1944, s. 39, sub-s. 1: "If any child of compulsory school age who is a "registered pupil of a school fails "to attend regularly thereat, the "parent of the child shall be guilty "of an offence against this "section."

Sub-section 2: "In any pro"ceedings for an offence against "this section in respect of a child "who is not a boarder at the "school at which he is a registered "pupil, the child shall not be "deemed to have failed to attend "regularly at the school by reason "of his absence therefrom with "leave or—(*a*) at any time when "he was prevented from attending "by reason of sickness or any un"avoidable cause . . . ."

R. G. Dow for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD C.J. I do not wonder that the justices felt considerable sympathy with the respondent in this case. They dismissed the information because they came to the conclusion that the child had not attended the school by reason of "an unavoidable cause," within the meaning of s. 39, sub-s. 2 (*a*) of the Education Act, 1944. This court feels that they are bound to say that there was no evidence on which the justices could so find, because the child had been continuously away from school. Out of 390 attendances she had missed 225. We think that the words "unavoidable "cause" must be construed in relation to the child. By s. 39, sub-s. 2 (*a*), it is a defence to a prosecution under that section that the child only failed to attend school "by reason "of sickness or any unavoidable cause." In my opinion, "sickness" in that paragraph must mean the sickness of the child. An "unavoidable cause" must be an unavoidable cause which actually affects the child. The alleged "unavoidable "cause" in the present case was one which really affected the mother and not the child.

Parliament has not seen fit to provide that what may be called "family responsibilities" or "duties" can be relied on as an excuse for a child not attending school. If we allowed the distressing facts of the present case to afford a defence to a prosecution under s. 39, it would mean that this child would not go to school at all and that the mother would keep the child at home all the time. I think that we are bound to hold that an "unavoidable cause" within the meaning of sub-s. 2 (*a*) of s. 39 must mean an unavoidable cause which actually affects the child's attendance, such as sudden serious illness or some emergency of that kind. If her parents' house were burnt down that would be properly regarded, at any rate for a day or two, as an "unavoidable cause." But I think "unavoidable cause" must be read in the present context as meaning something in the nature of an emergency. In the present circumstances I think that we are bound to hold that there was no evidence of an "unavoidable cause" within the meaning of s. 39, sub-s. 2 (*a*), and that the case must therefore go back to the justices with a direction that the offence was proved.

1949

JENKINS *v.* HOWELLS.

OLIVER J. I agree and I only wish to say this. When the excuse set up under s. 39, sub-s. 2 (*a*) is an excuse of chronic illness the effect of deciding as the justices have decided would be that a child, the daughter of a permanent invalid, would never go to school at all. I cannot read para. (*a*) of s. 39, sub-s. 2 of the Education Act, 1944, as possibly intended to include such a state of affairs as that, and for that reason I agree with the judgment of my Lord.

CASSELS J. I agree.

Appeal allowed.

Solicitors for appellant: *Theodore Goddard & Co. for W. S. Thomas, Carmarthen.*

R. P. C.

ROBERTS *v.* COOMBS.

1949
May 4.

Lord Goddard C.J., Birkett and Lynskey JJ.

Pharmacist—Penicillin—Supply or sell—Unregistered person—" Acting " in accordance with the directions "—Prescription—Penicillin Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 29), *s.* 1, *sub-s.* 1 (*a*) *and* (*b*).

None but a registered pharmacist or an authorized seller of poisons is entitled under s. 1, sub-s. 1, of the Penicillin Act, 1947, to supply penicillin or any preparation containing penicillin under the authority of a prescription. A person dispensing a prescription is not a person acting in accordance with the directions of a medical practitioner within meaning of the sub-section: and, therefore, a seller of drugs and surgical appliances who, not being a registered pharmacist or authorized seller of poisons, dispenses a prescription for a preparation containing penicillin commits an offence against the Act.

CASE stated by justices.

At a court of summary jurisdiction sitting at Feltham, Middlesex, informations were preferred by the appellant, Roberts, an inspector appointed by the Pharmaceutical Society of Great Britain under s. 25 of the Pharmacy and Poisons Act, 1933, charging the respondent, Coombs, who kept a shop in Staines Road, Bedfont, Middlesex, with unlawfully supplying penicillin ointment contrary to s. 1 of the Penicillin Act, 1947 (1). At the hearing it was proved

---

(1) Penicillin Act, 1947, s. 1, sub-s. 1: " . . . . no person shall " sell or otherwise supply any sub- " stance to which this Act applies

1949

ROBERTS
v.
COOMBS.

or admitted that the respondent sold by retail in his shop, inter alia, drugs and surgical appliances. He supplied penicillin ointment on four occasions in August, 1948, to different persons. On each occasion he supplied the ointment under a prescription signed by a qualified medical practitioner.

The justices held that the respondent was not a qualified medical practitioner, registered pharmacist or authorized seller of poison within the meaning of the Act, but held that he was a person " acting in accordance with the directions " of any such practitioner " ; that the ointment was " sold " or supplied in accordance with the directions of that " practitioner " within s. 1, sub-s. 1 (*a*), of the Act and that he had not therefore committed an offence under that section.

At the request of the appellant the justices stated a case for the opinion of the High Court.

The question submitted for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

Glyn-Jones K.C. and *T. Dewar* for the appellant. If the construction of the section adopted by the justices is correct, then it must follow that the registered pharmacist would be at a disadvantage because he could only supply on a doctor's prescription, whereas an unregistered person could supply if a doctor directed the drug to be supplied. That was not the intention of the legislature as otherwise the insertion of para. (*b*) would be completely otiose. It was manifestly clear that the intention of the Act was to keep the drug in the hands of qualified persons both for storing and supply, and once a doctor gave a prescription it was only a qualified person who could supply the drug.

L. R. Miller for the respondent. Where a duly qualified medical practitioner gives a patient a prescription containing

---

" or any preparation of which any " such substance is an ingredient " or part unless—(*a*) he is a " duly qualified medical practi- " tioner, a registered dental " practitioner or a registered " veterinary surgeon, or a person " acting in accordance with the " directions of any such practi- " tioner or surgeon, and the " substance or preparation is sold " or supplied for the purposes " of treatment by or in accordance " with the directions of that " practitioner or surgeon ; or " (*b*) he is a registered pharmacist " or an authorized seller of poisons, " and the substance or preparation " is sold or supplied under the " authority of a prescription signed " and dated by any such " practitioner as aforesaid."

1949

ROBERTS
v.
COOMBS.

penicillin and such prescription is made up by an unqualified or unregistered person then such person can be said to be acting in accordance with the directions of that practitioner and therefore the provisions of the Act are complied with and no offence is committed.

LORD GODDARD C.J. This is a case stated by justices for the County of Middlesex before whom the respondent, who keeps a shop at which he sells by retail drugs and surgical appliances, was charged on four informations with offences against s. 1 of the Penicillin Act, 1947. The facts were that the respondent supplied on four different occasions penicillin ointment to persons who had doctors' prescriptions. The section which we have to construe is s. 1, sub-s. 1 (*a*) and (*b*). [His Lordship read the section and continued :] If the person who sells or supplies is a registered pharmacist or authorized seller of poisons he may supply the penicillin provided he does it under the authority of a prescription. If, notwithstanding that he is not a registered pharmacist or authorized seller of poisons, he can supply penicillin if he can produce a doctor's prescription, what was the object of putting in para. (*b*) which provides that a registered pharmacist may supply it provided he does so in accordance with a prescription ? As Mr. Glyn-Jones has pointed out, if we were to give the wide meaning to para. (*a*) which is contended for, the registered pharmacist would be at a disadvantage because, as a registered pharmacist, he can only supply on a doctor's prescription. If he is not a registered pharmacist he can supply it if a doctor directs it to be supplied. I think it clear that if an intelligent meaning is to be given to both these paragraphs, the " person " acting in accordance with the directions of any such " practitioner or surgeon " must mean a person acting on the direct order, that is to say, a person, for instance, in the position of a dispenser where a doctor himself dispenses medicines. If he tells his dispenser : " Make up a penicillin " prescription and give it to one of the patients," the dispenser is acting under the directions of the doctor ; but if it is a question of a doctor giving a prescription to a person, in my opinion the only intelligible meaning we can give to the words is that that prescription must be dispensed by a registered pharmacist. The reason is obvious ; it is to keep the supply and the storing of this drug under the control of qualified persons and qualified persons only. A doctor

1949

ROBERTS v. COOMBS.

Lord Goddard C.J.

can supply it, or cause it to be supplied, to somebody acting under his directions, and a registered pharmacist can supply it if he is given a prescription by a doctor. It seems to me that if the section is read, as it must be read, so as to give effect to para. (*b*) as well as to para. (*a*), it clearly means that an unregistered person is not entitled to supply on the prescription of a doctor. It can only be supplied by a registered pharmacist and, of course, it follows that an unregistered person cannot supply it at all unless that unregistered person is in the employment of a doctor or in some way actually under the direct orders of the doctor, in which case he may supply it. I should doubt if it could ever be said that it could be supplied in accordance with the directions of a practitioner or surgeon unless it was by a doctor's own dispenser, but I do not think it is necessary to decide that.

Under the circumstances, I think the case must go back to the justices with an intimation that the offences were proved in each case.

BIRKETT J. I am of the same opinion. This Act of Parliament which we are called upon to construe is an Act to control the sale and supply of penicillin and certain other substances. The method of control devised by Parliament is in s. 1, sub-s. 1 (*a*) and (*b*). As I read the statute, the method of control is this, that in para. (*a*) a specific class of persons is designated, "a duly qualified medical practitioner, a "registered dental practitioner or a registered veterinary "surgeon, or a person acting in accordance with the directions "of any such practitioner or surgeon." Then, I think the concluding words of the paragraph are important: "And "the substance or preparation is sold or supplied for the "purposes of treatment by or in accordance with the directions "of that practitioner or surgeon." That is the first class. Then the second class is "a registered pharmacist or an "authorized seller of poisons, and the substance or preparation "is sold or supplied under the authority of a prescription "signed and dated by any such practitioner as aforesaid." I think, therefore, the method of control was to designate quite clearly the classes of persons who were authorized by law to sell or supply penicillin. The only arguable point has been taken by Mr. Miller, namely, that where a duly qualified medical practitioner, for example, gave a prescription to a patient which contained penicillin, and if an unregistered or an unqualified man made up that prescription, he was then a person acting in accordance with the directions "of "any such practitioner or surgeon." I cannot read the statute in that way. I think any such reading would defeat the control which was designed and laid down in the sub-section.

There is this further reason: the word "prescription" is universally known; it is, indeed, used in para. (*b*): "under "the authority of a prescription signed and dated by any "such practitioner." It is to be observed that when the prescription signed and dated by the medical practitioner or the surgeon comes into being, it can only be made up by a registered pharmacist or an authorized seller of poisons. I should have thought it quite clear that if it had been intended that any such prescription signed by any such practitioner might be made up by anybody, the statute would clearly have said so. That is an additional reason for my thinking that the words "or a person acting in accordance with the "directions of any such practitioner or surgeon" cannot possibly be an unauthorized practitioner at all.

For these reasons I agree with the conclusion announced by my Lord.

LYNSKEY J. I agree. I only desire to add this: In my view s. 1, sub-s. 1 (*a*) is concerned with directions given by a practitioner or surgeon for the purposes of treatment by or in accordance with his directions, and they must be directions given to the person who is supplying or selling the substance. If such directions are given to that person particularly by the doctor so that he is acting under his immediate directions, it may be that whether qualified or not he comes within the protection of sub-s. 1 (*a*).

Section 1, sub-s. 1 (*b*), is concerned with written prescriptions, and written prescriptions as a rule are not directed to any particular person; they are at large. It is difficult to say under those circumstances that the pharmacist would be acting under the directions of the doctor in the actual supply for the purposes of treatment, the directions are given to the patient to enable him to obtain a supply of the material. In my view whatever else the words, "in accordance with "the directions of any such practitioner or surgeon," in para. (*a*) may mean, having regard to the presence of para. (*b*) such a direction cannot be contained in a written prescription.

1949

ROBERTS
v.
COOMBS.

In my opinion in those circumstances, the case ought to go back to the justices to say that the offences were proved.

Appeal allowed.
Case remitted.

Solicitor for the appellant: *A. C. Castle.*
Solicitors for the respondent: *Freeborough & Co.*

L. F. J. McD.

C. C. A.

1949
May 10.

Lord Goddard C.J., Oliver, Birkett, Lynskey and Sellers JJ.

REX *v.* CLUCAS.

Criminal law—Horse racing—Obtaining money by false pretences—False statement as to identity and capacity—Payment on horse winning—Repetition of false statement—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32, *sub-s.* 1.

On the trial of an indictment for conspiring to obtain, attempting to obtain and obtaining, money by false pretences the following facts were proved:

The appellant and another man, induced bookmakers to bet with them by representing that they were commission agents acting on behalf of a large number of workmen who were placing small bets on various races, whereas in fact they were making bets in considerable sums of money for themselves alone. Payment was made by the bookmaker on the horse winning.

Held, that the money paid by the bookmaker was not obtained by false pretences as the effective cause of the payment was the horse winning and not the false representations.

Reg. v. *Button* [1900] 2 Q. B. 597 distinguished.

APPEAL against conviction and sentence.

At Norwich Assizes, before Hallett J. and a jury, on February 3, 1949, the appellant, Clucas, was charged on indictment with conspiring to obtain, attempting to obtain, and obtaining, money by false pretences, contrary to s. 32, sub-s. 1, of the Larceny Act, 1916 (1).

---

(1) Larceny Act, 1916, s. 32, sub-s. 1, provides that: "Every "person who by any false pre- "tence—(1.) with intent to "defraud, obtains from any other "person any chattel, money, or "valuable security, or causes "or procures any money to be "paid, or any chattel or valuable "security to be delivered to "himself or to any other person "for the use or benefit or on "account of himself or any other "person . . . . shall be guilty of "a misdemeanor."

By the first count of the indictment the appellant and one Revell, were charged with conspiring to defraud a bookmaker by falsely pretending that Revell was employed at an aerodrome and in a position to act as a commission agent for the collection of bets from workmen employed there. By the third count both the appellant and Revell were charged with conspiring to obtain money from another bookmaker by similar false pretences. By six other counts either the appellant or Revell or both were charged with obtaining or attempting to obtain money from bookmakers by similar false pretences. In those cases, it was alleged that having opened accounts with bookmakers by false pretences as to their identity or the capacity in which they betted, they backed horses which won.

The jury found both the appellant and Revell guilty. The appellant was sentenced to two years and Revell to eighteen months' imprisonment.

The appellant now appealed.

Honig for the appellant. One of the necessary ingredients of an offence under s. 32 of the Larceny Act, 1916, is fraud, and that means inducing a man by false pretences to act to his own injury. The injury contemplated must be monetary. The cause of the monetary injury in this case was the horse winning and the fact that representations were made could not have any bearing on the result of the races. Such results were outside the control of the appellant. The essential difference between a gaming and wagering contract and a commercial transaction, is that in the latter the monetary injury follows immediately on the making of false pretences, whereas in the former there must be an intermediate state which is not present in an ordinary commercial transaction. There was no direction by the judge on this point. All that actually happened here was that the appellant obtained the chance of being able to place bets with the bookmakers in question. There was no continuity between what was said to the bookmakers and the way in which the money was obtained. The agreement obtained was of such a nature as not to be enforceable, as the bookmakers would only pay if they so desired and if the horse won. The facts as adduced by the evidence did not amount to the offence charged. [*In re London and Globe Finance Corporation Ld.* (1); *Rex* v.

(1) [1903] 1 Ch. 728, 732.

Bennet and Newton (1) and *Rex* v. *Bassey* (2) were referred to.]

Boileau for the Crown. There was here a continuity between the false pretence and the obtaining of the money, and whether there was such continuity or not was a fact for the jury, which in this case they found against the appellant.

Here an agreement was brought about to induce bookmakers to enter into bets and it is quite irrelevant what had to be done—The horse had to win before money was paid and this constituted a continuing false pretence: *Reg*. v. *Button* (5), is indistinguishable in principle from this case. Here a chance to bet with a bookmaker was obtained by telling lies, which chance would not have been obtained had such lies not been told. It was the bargain with the bookmakers that allowed the appellant to obtain the money on the horse winning. If there is a continuing offence, then the question for the jury is whether the false pretence was the effective cause of the money being obtained.

The Larceny Act, 1916, enacts that reference may be made to the Gaming Act, 1845, which directs that certain matters are to be deemed false pretences. There could not in this case have been a charge under the Debtor's Act, 1869: *Rex* v. *Leon* (4). If a false pretence continued to operate on the mind of the bookmakers then the verdict was correct. The representations made caused the bookmaker to pay and it was purely a question of fact for the jury. [*Reg*. v. *Abbott* (5); *Reg*. v. *Martin* (6); *Rex* v. *Governor of Brixton Prison* (7) were referred to.]

Lord Goddard C.J. delivered the judgment of the court. The appellant in this case was convicted with a man named Revell before Hallett J. at Norwich Assizes on six counts of an indictment which charged, in the first count a conspiracy between the two prisoners to defraud a bookmaker named Gamble by falsely pretending that Revell was employed at the Suttonbridge aerodrome and that he was in a position to act or was acting as a commission agent for the collection of bets for workmen on that aerodrome. The third count alleged a similar conspiracy to defraud a bookmaker named

---

(1) (1913) 9 Cr. App. R. 146, 154.

(2) (1931) 22 Cr. App. R. 160, 162.

(3) [1900] 2 Q. B. 597.

(4) [1945] K. B. 136.

(5) (1847) 2 Cox C. C. 430.

(6) (1867) L. R. 1 C. C. R. 56.

(7) [1912] 3 K. B. 568.

C. C. A.
1949
REX
v.
CLUCAS.

Cranmer by the same false pretences and some additional false pretences. The fourth count charged both prisoners that with intent to defraud they attempted to obtain from the first bookmaker a sum of money by falsely pretending that some third person had asked them to place bets on a horse and that they were acting as agents in placing those bets. The fifth count charged them that with intent to defraud they obtained from Cranmer a sum of money by making the same or similar false pretences; and the seventh count charged that this appellant alone "with intent to defraud, obtained from "S. C. Cranmer & Co., a valuable security, namely a banker's "cheque for 123*l.* 6*s.* 7*d.*" by means of substantially the same false pretences.

The evidence showed that these two men, who obviously were thoroughly dishonest people, induced bookmakers to bet with them by representing that they were commission agents acting on behalf of a large number of workmen who were putting small bets on various races, whereas in fact they were making bets in considerable sums of money for themselves alone.

The main point which arises in the case and which arises on all the counts except count 1, in respect of which there are particular circumstances with which I shall deal in due course, may be stated in this way: Does a man who induces a bookmaker to bet with him by making false pretences as to his identity or as to the capacity in which he is putting on the bets, obtain money by false pretences if he is fortunate enough, having made those pretences, to back a winning horse so that the bookmaker pays him? The case as it was argued originally before a court consisting of three judges raised this point and the court showed when they adjourned the hearing, that there was not unanimity at that stage, consequently they adjourned it to be heard before a full court, for which reason five judges have now heard it.

In the opinion of the court it is impossible to say that there was an obtaining of the money by the false pretences which were alleged, because the money was obtained not by reason of the fact that the people falsely pretended that they were somebody else or acting in some capacity which they were not; it was obtained because they backed a winning horse and the bookmaker paid because the horse had won. No doubt the bookmaker might never have opened an account with these men if he had known the true facts, but we must distinguish in this case between one contributing cause and the effective cause which led the bookmaker to pay the money.

The effective cause which led the bookmaker to pay the money was the fact that these men had backed a winning horse. It has been held in *Rex* v. *Leon* (1) that as bets on horse races are null and void a charge will not lie against a fraudulent or dishonest backer for obtaining credit from the bookmaker because the credit he obtains is credit in respect of a null and void bet. Although these two men induced the bookmaker to bet with them by means of a false pretence, what the court cannot see is that that false pretence was the false pretence which led to the payment of the money. What led to the payment of the money was the fact that these men backed a winning horse by inducing the bookmaker to bet with them. They put themselves in the position that if they backed the horse and lost, they had to pay the bookmaker and if they backed the horse and won they were entitled to receive the money. In the opinion of the court, therefore, it cannot be said that the money was obtained by false pretences within the meaning of s. 32, sub-s. 1, of the Larceny Act, 1916.

Mr. Boileau has called the attention of the court to certain cases, and no doubt the nearest case to this one and the only one which I think it is necessary to mention is *Reg*. v. *Button* (2). In that case the defendant, by representing that he was a person of the name of Sims, who was a very moderate performer in athletic sports and was not known as a likely winner of races, managed to obtain from the committee of some athletic sports which were to be held at Lincoln a very substantial handicap in a race. He was in fact a man who had won a great many races and had the truth been known he would have received either no handicap at all or a very moderate handicap instead of the very substantial handicap which he obtained. Indeed, after the race was won by him he repeated the false pretence to the secretary and obtained a prize, but it was not only on account of the repetition of the false pretence that he obtained the prize. The court held that by falsely representing himself to be someone he was not, thereby obtaining a substantial handicap, he obtained the prize on false pretences because it was a matter directly connected with the winning or not winning of the prize. He obtained for himself a winning chance. He got the handicap

(1) [1945] K. B. 136.

(2) [1900] 2 Q. B. 597.

which he would not otherwise have got, and thereby enabled himself to win the race. We think that that case on the facts is clearly distinguishable from this case.

Now we have to consider the first count in the indictment which is a count for conspiracy, and the facts relating to the conspiracy were these: having already made the false pretence with regard to their identity and the capacity in which they were putting the money on, the appellant and Revell backed a horse that won a race. Revell then went to collect the money, and the bookmaker suspecting that all was not right, and that these men were not the people they represented themselves to be, was unwilling to pay over the money without obtaining further assurances that they were the men they pretended to be or, at any rate, that Revell was the man he pretended to be. Revell repeated the false pretence after the race was won by the horse they had backed, and went so far as to tell the bookmaker Gamble, that he could telephone a certain number which would be the number of the aerodrome or place where these people were supposed to be working. He gave him the number and said if the bookmaker did telephone that number he would get confirmation of the story that Revell told him. All this time, according to the evidence, this defendant was loitering about in the neighbourhood of the telephone kiosk which bore that number, to answer should a call come through. Clearly that shows these two men were conspiring together. They conspired in the first place to tell these lies to the bookmaker and even without this evidence, that this man was hanging about the telephone kiosk to answer any inquiry which came through—and representing himself to be some person other than he was—there was abundant evidence on which the jury could find that Revell in going to collect the money and repeating the story, was acting in concert and in pursuance of the conspiracy. Therefore what he did was evidence against his co-conspirator. There was substantially no direction to the jury on this point or on those lines, but both the prisoners gave evidence. The evidence which they gave admitted the facts which I have stated with regard to the telling of the lies to the bookmaker and the putting on of bets in assumed names. Therefore, under those circumstances the absence of any direction in the case could not have made any difference because no reasonable jury could have come to any other conclusion on the admitted evidence and on the evidence of the prisoners themselves

C. C. A.
1949
REX v. CLUCAS.

than that they had conspired together to cheat the bookmaker of this sum of money. Therefore, with regard to count 1 the conviction must stand. With regard to the other counts against these men the conviction must be quashed.

The court, having quashed the conviction on several of these counts, thinks that a reduction in sentence must be given and has decided to halve the sentence and to say that the sentence will be twelve months from the date of conviction.

Appeal allowed in part and sentence reduced.

Solicitor for the appellant: *Registrar, Court of Criminal Appeal.*

Solicitors for the Crown: *Peacock and Goddard agents for Jackson and Walton, King's Lynn.*

L. F. J. McD.

Affirmed. H.L. *sub nom.* READING *v.* A.-G. [1951] 1 All E.R. 617.

Affirmed. READING *v.* ATTORNEY-GENERAL [1951] A. C. 507

READING *v.* THE KING.

C. A.
1949
Apr. 1, 11; *May* 19.
Tucker, Asquith and Singleton L.JJ.

Petition of right—Claim by British ex-soldier to money taken from him by Military authorities in Egypt—Money acquired by soldier in consideration of his presence in uniform on civilian lorry loaded with illicit cargo—Relation of Crown to soldier—Whether same as that of master and servant—Money acquired solely by use of uniform and military position—Title of Crown to money.

The suppliant, an ex-sergeant of the Royal Army Medical Corps, while on active service in Egypt in 1942, drove in a civilian lorry from a village near Heliopolis to an address in Cairo to which he had been directed, for the purpose of transporting cases of illicit spirits and/or drugs. He made in all nine such journeys, on each occasion in full military uniform, and for his services in diverting, by his presence in uniform, the suspicions of the police he received, in sums ranging from 1,000*l.* to 4,000*l.*, a total sum of 20,000*l.* Following his trial and conviction by court martial of conduct prejudicial to good order and military discipline the balance of the money was held for the Crown. By the present petition of right the suppliant claimed the return of the money.

Held, that the uniform entrusted to a soldier by the Crown was intended to be used for the Crown's interest and benefit, and not otherwise, and any secret profits or bribes acquired by the soldier by an improper use of his uniform and the opportunities and facilities attaching to it were recoverable by the Crown, whose interest included the maintenance and promotion of harmonious relations with the Egyptian Government, with which it was allied;

C. A.
1949
READING v. THE KING.

that even if a fiduciary relation between the Crown and the suppliant were necessary to enable the Crown to recover and retain the money in question such a relation subsisted as to the user of the uniform and the opportunities and facilities which attached to it.

Decision of Denning J. [1948] 2 K. B. 268, affirmed.

APPEAL from Denning J. (1).

Petition of Right.

In 1942 the suppliant, a sergeant in the Royal Army Medical Corps, was stores-keeper at the General Hospital at Cairo. In December, 1942, while on leave at Alexandria, he was asked by a man to help him to sell cases of whiskey and brandy to agents in Cairo. In the following month a man called Manole met him outside the hospital and directed him to a village near Heliopolis. The suppliant went to the village and there met Manole, who was in a loaded lorry. Manole got out of the lorry and directed the suppliant to get into it and proceed to a particular place in Cairo. The suppliant, who was in full military uniform, carried out his instructions. The same evening he again met Manole in a restaurant in Cairo and was handed an envelope containing 2,000*l.* In a statement subsequently made to the authorities the suppliant admitted that he suspected that the lorry's cargo included drugs, but in the period extending to March, 1944, he made eight more similar journeys and received, in sums varying from 1,000*l.* to 4,000*l.*, a total amount of 20,000*l.* In March, 1944, it became apparent to the military authorities in Cairo that the suppliant, a married man with several children, was living in a luxurious manner far beyond his means as a soldier. Inquiries therefore were set on foot by the special investigation branch of the army, and it was found that the suppliant had about 11,000*l.* in two different banks in Cairo, and a further sum of about 7,000*l.* in cash was found when his quarters were searched. The suppliant was arrested and the 7,000*l.* was seized by the military authorities, who subsequently took possession of the bank accounts. A sum of about 5,000*l.* was afterwards released to the suppliant to cover his expenses in connexion with the present proceedings.

In November, 1944, the suppliant was tried by court martial under s. 40 of the Army Act, charged with conduct to the prejudice of good order and military discipline. He was found guilty and sentenced to two years' imprisonment and to be reduced to the ranks.

---

(1) [1948] 2 K. B. 268.

The Crown having retained the balance of 13,000*l.* odd, the suppliant by the present petition claimed the return to him of that sum. On May 10, 1948, Denning J. dismissed the petition and the suppliant appealed.

Cyril Salmon K.C., C. H. Pearson and *H. F. Cassels* for the suppliant.

Sir Hartley Shawcross A.-G., P. R. Barry K.C., and *H. L. Parker* for the Crown.

The arguments are reported in the proceedings before the trial judge and are sufficiently indicated in the judgment of this court.

Cur. adv. vult.

May 19. ASQUITH L.J. read the judgment of the court: The suppliant, Charles Henry Reading, was in the year 1944 serving in Cairo as a sergeant in the Royal Army Medical Corps, where he was in charge of medical stores. In March of that year it was discovered that large sums of money were standing to his credit at banks in Egypt, in his flat were notes to the value of several thousand pounds and he was possessed of a valuable motor-car. He was questioned as to these moneys and he made a statement which was the foundation of the case for the Crown at the trial before Denning J. This trial resulted in the dismissal of his petition of right in which he sought to recover a sum of about 13,000*l.*, being the balance of the aforementioned sums which had been seized by the military authorities consequent upon his statement. It was conceded that the onus lay on the Crown to establish a right to the retention of these moneys or, if the suppliant was entitled to them, a right to set off an equal sum against his claim. This the Crown sought to do on the basis that Sergeant Reading was at all material times a servant of the Crown, and that the moneys in question represented bribes which he had received for accompanying loaded lorries in and about Cairo while wearing His Majesty's uniform and thus enabling the lorries to escape police inspection. The suppliant gave no evidence at the trial, and accordingly the facts or inferences of fact had to be deduced from the statement which he had made. The learned judge inferred from this statement that the suppliant had received in all some 20,000*l.*

from a man named Manole in the following circumstances: a lorry used to arrive loaded with cases, the contents of which were unknown; then Reading in full uniform boarded the lorry and escorted it through Cairo, so that it was able to pass the civilian police without being inspected; when it reached its destination it was unloaded or the contents transferred to another lorry. Later the appellant was handed an envelope containing notes varying in value from 2,000*l.* to 3,000*l.* for each journey. The learned judge below stated that it was quite plain that he got this money because he was a sergeant in the British army and was there in uniform escorting these lorries through Cairo, and that he was clearly violating his duty in so doing. Later in his judgment he said the use of the facilities provided by the Crown in the shape of the uniform, and the use of his position in the army, were the sole reasons why Sergeant Reading was able to get this money. It was solely on that account that he was able to sit in the front of these lorries and give them a safe conduct through Cairo.

We agree that the above statement represents the proper inferences of fact to be drawn from the material placed before Denning J. The only question is as to the law applicable to these facts. With regard to the law Denning J. said: "In my judgment, it is a principle of law that if a servant "takes advantage of his service by violating his duty of "honesty and good faith, to make a profit for himself, in this "sense, that the assets of which he has control, or the facilities "which he enjoys, or the position which he occupies, are the "real cause of his obtaining the money, as distinct from "being the mere opportunity for getting it, that is to say, "if they play the predominant part in his obtaining the "money, then he is accountable for it to the master."

Later, after referring to the case of *Attorney-General* v. *Goddard* (1), he said: "There was not, in this case, a fiduciary "relationship; and this man Reading was not acting in the "course of his employment. In my opinion, however, those "are not essential ingredients of the cause of action. The "uniform of the Crown, and the position of the man as a "servant of the Crown, were the sole reasons why he was "able to get this money, and that is sufficient to make him "liable to hand it over to the Crown."

Mr. Salmon for the suppliant contends that this statement of the law goes beyond the authorities, and that it appears from the judgment as a whole to be based upon the principle of "unjust enrichment," which he contends forms no part of our law. He argues that *Sinclair* v. *Brougham* (1) has established that such a claim as that made by the Crown in the present case must be on the basis of money had and received, which requires the imputation of a promise and that the court will not impute such a promise where it involves a participation in the fruits of an illegal transaction. The principles of law applicable to such a case as the present would seem to be the following. When a servant, or agent, by a breach of duty damnifies his master or principal, the latter can, of course, recover in an ordinary action for breach of contract for any loss he has actually suffered. But there is a well established class of cases in which he can so recover, whether or not he has suffered any detriment in fact. These are cases in which the servant or agent has realized a secret profit, commission or bribe in the course of his employment; and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the defendant and that the defendant acted in breach of this relation. But the term "fiduciary relation" in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a "fiduciary relation" exists (*a*) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise (for instance, *Shallcross* v. *Oldham* (2) and *Attorney-General* v. *Goddard* (3)) and (*b*) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available (for instance, *Lister & Co.* v. *Stubbs* (4) and *Powell Thomas* v. *Even Jones* (5)).

---

(1) (1929) 98 L. J. (K. B.) 743.

In such cases the defendant may accept a secret profit from a third person in consideration, for instance, of hiring out the plaintiff's chattel, or giving away the plaintiff's secret,

(1) [1914] A. C. 398.
(2) (1862) 2 J. & H. 609, 616.
(3) 98 L. J. (K. B.) 743.
(4) [1905] 1 K. B. 11.
(5) (1890) 45 Ch. D. 1.

or awarding the plaintiff's contract, to such a third person: or indeed may make such a profit by himself masquerading as a third person and selling to, or buying from, the plaintiff in that guise. If he does so, he is bringing his duty to the plaintiff and his own interest into conflict, in derogation of the fiduciary bond, and cannot be heard to say that duty prevailed and the plaintiff suffered no loss. The plaintiff, whether actually harmed or scatheless, is conclusively presumed not only to have been damnified, but to have been damnified to an extent measured by the amount of the secret profit received by the defendant (see for instance, *Parker* v. *McKenna* (1)). This amount the plaintiff can recover, either as money had and received to his use, or as an equitable debt (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, per Bowen L.J. (2)). (It is not very clear why Rowlatt J. in *Attorney-General* v. *Goddard* (3) held that the sum claimed could be recovered in equity only, and not as money had and received at common law, for he cites this passage from Bowen L.J.)

As regards money had and received it was argued for the suppliant that the law cannot impute to him a fictitious promise which, if actually made, would have been void. No doubt an actual promise in advance of the event by A. to B. to pay over any bribe A. might receive as the result of breaking the local criminal law, would have been void for illegality. But an actual promise made by A. after he has, without B.'s knowledge or privity, received such a bribe, to pay it over to B., would not be void on this ground, and it is to that point of time, in our view, that the law refers the imputed promise. *Sinclair* v. *Brougham* (4), relied on under this head, is not in point. It deals with lack of capacity to contract, not with illegality of consideration, and it decides nothing specific as to the point of time at or from which any imputed promise must be considered as operating.

In the present case the master, the Crown, entrusts to its servant a uniform, to be used for the master's interest and benefit, and not otherwise. It is not the soldier's property. He may not sell it. But it is, in our view, in the course of

---

(1) (1874) L. R. 10 Ch. 96, 124, 125.

(2) (1888) 39 Ch. D. 339, 367.

(3) 98 L. J. (K. B.) 743.

(4) [1914] A. C. 398.

C. A.

1949

READING
v.
THE
KING.

his employment to wear it. That is one of the class of acts which qua soldier he is employed to do. He must wear it at the time and place and in the manner and for the purpose which the master prescribes; or in the absence of specific directions, for the benefit and in the interests of his master, and not otherwise. The master's interest in the circumstances of this case included the maintenance and promotion of harmonious relations with the Egyptian Government, with which the Crown was allied against Germany and Italy, an interest which would hardly be advanced if the soldier systematically abetted violations of the Egyptian Criminal Code. A uniform is in one aspect a physical object. But it is also the vehicle of certain intangible adjuncts—authority, prestige, immunities of various kinds, a certain status and standing. Inter alia it carries with it facilities for imparting a veneer of officialism and legality to transactions which, without its imprimatur, would arouse suspicion. These facilities attaching to the uniform the suppliant was bound to use for his master's benefit. It seems not only a natural but an almost inevitable inference from the facts of this case that it was precisely these facilities which Reading sold and Manole bought. He had no more right to do this than to sell the uniform itself. Reading consciously used his uniform to disarm the suspicions of the Egyptian police—to divert their suspicion from what he must have known to be an illegal enterprise in the traffic in drugs or drink; and he made a fortune by doing so. This use of the uniform was not only in breach of Egyptian criminal law but flagrantly in breach of the duty Reading owed to the Crown.

Assuming a fiduciary relation is necessary to enable the Crown to recover, we are of opinion, differing in this respect from the learned trial judge, that in the wide sense in which the term is used in the relevant cases such a relation subsisted in this case as to the user of the uniform and the opportunities and facilities attached to it; and that the suppliant obtained the sums claimed by acting in breach of the duties imposed by that relation. The inference of a fiduciary relation is certainly not weakened by the circumstance that the suppliant was a non-commissioned officer on active service in a foreign country allied with His Majesty. But we do not wish to be taken as holding that if the fiduciary relation were absent the appeal would necessarily succeed.

C. A.
1949
READING
v.
THE
KING.

We are of opinion that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for suppliant: *Lewis & Lewis & Gisborne & Co.*
Solicitor for Crown: *The Treasury Solicitor.*

A. W. G.

CANADIAN PACIFIC RAILWAY *v.* GAUD AND OTHERS.

C. A.
1949
May 9, 10, 11.
Cohen and Singleton L.JJ.

Canada—Seamen—Refusal of Canadian shipowners to recognize seamen's union—Strike of crew—Refusal to obey orders—Discharge of crew by master without sanction of proper authority of port—Sanction not obtainable—Refusal of crew to leave ship—Refusal of stevedores to discharge cargo—Ship held up in British port—Action by shipowners for damages for trespass, etc.—Interlocutory mandatory injunction to restrain trespass granted by High Court—Canada Shipping Act, 1934 (24 *&* 25 *Geo* 5, *c.* 44), *ss.* 2, 284, *sub-ss.* 1 *and* 3, *and* 573.

Following the refusal of Canadian shipowners to recognize the Canadian Seamen's Union, of which the crew of their vessel, the *Beaverbrae* were members, the crew (who had signed articles under the terms of an agreement between their union and the shipowners' agents), on the arrival of the ship in the port of London went on strike and refused to obey orders, except for the purpose of carrying on essential services. In sympathy with the strikers the stevedore's men refused to discharge the cargo, and having received orders from the shipowners' agents to sign off the crew, the master got into communication with the port superintendent of the Ministry of Transport with a view to obtaining his sanction to the discharge of the seamen, as required by s. 284 of the Canada Shipping Act, 1934, but was informed that that official was not permitted to assist in complying with the formalities required by the Canadian Act. The master thereupon discharged the crew and when they still refused to leave the ship the shipowners applied for and obtained from Sellers J. an interlocutory injunction restraining the crew from remaining or going on board the vessel. On appeal by the crew:—

Held, that the Canadian Act could not compel the superintendent of the port to give his sanction to the discharge of the crew, and the master, having proved that sanction could not be obtained, or was unreasonably withheld, had established, by necessary implication, that he had committed no offence under s. 284, sub-s. 3, of the Canadian Act; that s. 573 of the Canadian Act, which provides for the summoning of a naval court by any officer in command of any ship belonging to His Majesty on any foreign station, or in the absence of such officer by any British consular officer, does not apply to the Port of London, but is intended to apply to out-of-the-way places where there is no civil court with jurisdiction to deal with such disputes as the present one; and that the courts of this country undoubtedly had jurisdiction to deal with the present dispute and there being evidence on which Sellers J. could reasonably hold that the balance of convenience was in favour of granting the injunction, the Court of Appeal could not interfere with the exercise of the learned judge's discretion.

Decision of Sellers J. affirmed.

APPEAL from Sellers J.

On March 12, 1949, the master of the Diesel electric vessel *Beaverbrae* signed on a crew under articles which contained provisions by which the seamen agreed " to conduct themselves " in an orderly, faithful, honest and sober manner and to be " at all times obedient to the lawful commands of the master " or of any person who shall lawfully succeed him, and of their " superior officers, in everything relating to the said ship " and the stores and cargo thereof, whether on board, in boats, " or on shore." At the time when the said articles were opened the terms of the crew's employment, so far as not expressly covered by the articles, were governed by an agreement between the Canadian Seamen's Union (of which all the men were members) and the Canadian Pacific Steamship Ld. who managed the ship for the plaintiffs. The said agreement provided by art. 1: " The companies recognize the [Canadian " Seamen's] union as the sole collective bargaining agency " for all unlicensed personnel from time to time employed " by the companies on all deep sea passenger ships." By art. 11 the agreement was to remain in full force and effect for a period of one year; and art. 3, by cl. 5, provided: " There shall be no strikes, lock-outs, slow down or stoppage " of work during the life of the agreement." The *Beaverbrae* arrived in the port of London on the morning of April 3, 1949, with a cargo which included wheat and flour. It being a Sunday the discharge of cargo could not be commenced on that day and the master went ashore. On his return he was informed by the chief officer that the crew, through their delegates, had announced their intention to go on strike as from five o'clock, but that they would remain on board and would carry out essential services if required. The master interviewed the delegates, who adhered to their decision, stating that their union was calling a general strike because the Canadian shipowners were negotiating another agreement with the Seafarers' International Union, said to be an American concern. Despite the stoppage of wages and allotments and the issue of cigarettes, etc., the crew persisted in their refusal to work or to leave the ship and the port stevedores also refused to unload the cargo. Having been instructed by the managers of the ship to sign off the crew the master got into communication with the port superintendent of the Ministry of Transport with a view to obtaining his sanction to the discharge of the crew, as required by s. 284 of the Canada Shipping Act, 1934, and was informed that that official was not permitted to assist in complying with the formalities required by that Act. On April 22, police court proceedings were commenced against the crew for disobedience of orders, but those proceedings failed for want of strict proof of Canadian registry of the ship. On April 23 the master gave notice to the men that unless they reported for duty on the morning of April 25 they would be dismissed and must leave the ship forthwith with all their belongings. This order not being complied with the writ in the present action, claiming damages for trespass and breach of contract, and an injunction to restrain the trespass, was issued on April 26. On May 5, Sellers J. granted an interlocutory injunction restraining the crew from remaining or going on board the ship. The defendants appealed.

Collard for the defendant seamen: The case for the crew is that the first breach of the agreement contained in the articles was committed by the shipowners in refusing to recognize the Canadian Seamen's Union, of which all the crew are members, and seeking to compel them to transfer to the Seafarers' International Union said to be an American union. Beyond explaining the facts of the strike to the stevedores the crew have done nothing to induce the stevedores to refuse to unload the ship. The stevedores have acted entirely on their own initiative and will not unload the cargo while the strike exists. It has not been established that it is the presence of the crew on board, apart from the existence of the dispute, which renders it impossible to discharge the cargo. It is admitted that British courts have complete jurisdiction

C. A.
1949
CANADIAN PACIFIC RAILWAY v. GAUD.

over foreign merchant ships in British ports, but they will not exercise it where the sole cause of complaint concerns, as here, the internal discipline of the ship. If the tranquillity of the port is involved then the courts will assume jurisdiction. They will not grant an injunction which may assist the plaintiff to commit an illegal act, or if the effect is oppressive. These seamen are all Canadian citizens and the effect of the injunction is to uproot them from Canadian soil, represented by this Canadian ship, and forcing them into exile in this country. They are not trespassers because their articles have never been lawfully terminated, and they are entitled to remain on board until they have been properly discharged. In any case the facts do not justify interlocutory relief even if, on trial of the action, the shipowners might make out a case for a permanent injunction. Under the Canada Shipping Act, 1934, seamen's articles can be terminated abroad only by consent of all parties, or by the "proper authority," the superintendent of the port, investigating the case and authorizing the termination of the articles: see s. 284 of the Canada Shipping Act, 1934 (1).

There is only one procedure for the discharge of Canadian seamen abroad, and that not having been followed these men have not been discharged. A master who wrongfully discharges seamen abroad commits a criminal act and so also does he if he leaves them behind in a foreign port: see sub-s. 3 of s. 284. Seamen are in a position entirely different from that of workmen in a factory. The relationship between them and the shipowner is governed by most unusual articles and the ship is their home as well as their place of work.

---

(1) Canada Shipping Act, 1934. Section 2: (73) "'Proper authority' "when used in Part IV of this "Act (Distressed Seamen) means ". . . . (*b*) as respects a place "out of His Majesty's Dominions, " . . . . in relation to the discharge or leaving behind of "seamen . . . . a superintendant "as defined in the Merchant "Shipping Act, or in the absence "of any such superintendant, "the chief officer of customs at "or near the place."

Section 284, sub-s. 1: "The "master of a ship registered in "Canada shall not discharge a "seaman at any place out of "Canada (except at a port in "the country in which he was "shipped), unless he previously "obtains, endorsed on the agreement with the crew, the sanction "of the proper authority as "defined for the purpose of this "Part of this Act, but that "sanction shall not be refused "where the seaman is discharged "on the termination of his "service." . . . . Sub-s. 3: "If "the master of a ship fails to "comply with this section, he "shall, in respect of each offence, "be guilty of an indictable offence, "and in any legal proceeding "for the offence it shall lie on "the master to prove that the "sanction was obtained or could "not be obtained or was unreasonably withheld."

[COHEN L.J. You are saying that the master having wrongfully discharged them, if they are turned out of the ship they would be wrongfully left behind ?]

Yes, and it would be wrong for this court to grant an injunction which might have that result.

[*Sir Wm. McNair K.C.* (for shipowners) : We have given an undertaking to house and repatriate the men.]

Section 573 of the Canada Shipping Act (1) provides for the summoning of a naval court to determine such a dispute as this, and that is the procedure which I submit should have been adopted, and still could be. The powers given to such a court include that of discharging a seaman from his ship. Before they can claim an interlocutory injunction the shipowners must establish irreparable hurt from trespass, and they have not done so, because it is the incidence of the dispute and not the presence on board of the seamen which is causing the damage complained of. This court should not interfere in what is simply an industrial dispute, but leave the matter to be settled by the Canadian courts.

Sir Wm. McNair K.C. and *Mocatta* for shipowners. To hold a naval court in the port of London is really such an extreme exercise of jurisdiction that it would not be tolerated ; nor can it be inferred from the language of the Act that this was a course open to the shipowners. The defendants have to satisfy this court that there were in the Port of London officers of His Majesty's Navy " on a foreign station," and London is not a foreign station.

[COHEN L.J. This Act was passed after the Statute of Westminster. Does not s. 573 refer to some port within the British Commonwealth but not in the British Dominions ?]

---

(1) Canada Shipping Act, 1934, s. 573 i " A court (in this Act " called a naval court) may be " summoned by any officer in " command of any ship belonging " to His Majesty, on any foreign " station, or, in the absence of " such an officer, by any British " Consular Officer . . . (i.) Whenever " a complaint which appears to " that officer to require immediate " investigation is made to him " by the master of any ship " registered in Canada, by a " certified mate, or by any one " or more of the seamen belonging " to any such ship ; (ii.) whenever " the interest of the owner of any " ship registered in Canada or of " the cargo thereof appears to " that officer to require it."

This machinery is intended to deal with out-of-the-way parts of the world where there is no appropriate jurisdiction to deal with the trouble. My learned friend's suggestion that a naval court should be summoned in the port of London is fantastic, the civil courts having complete jurisdiction. From the point of view of English law ships registered in Canada are not foreign ships but British ships, and the relationship between Canada and the United Kingdom is not governed by International Law but by law existing between members of the British Commonwealth. Section 284 of the Canada Shipping Act cannot impose duties upon persons who are not officials of the Canadian administration, and although s. 2 defines the "proper authority" as a superintendent "as "defined in the Merchant Shipping Act," if that official is not authorized to act under the Canadian Act nothing in that Act can compel him to do so. The section of the Canadian Act which deals with compensation for improper discharge corresponds with s. 162 of the Merchant Shipping Act, and in that section "discharge" does not mean paid off before a superintendent, but dismissed: see *The Olympic* (1). A seaman has no right to use a ship as his home. He is in the same position as any other person who has a temporary right to be on his master's property. He can be dismissed, and if he remains on board he is a trespasser. It is his duty to obey lawful orders, and it would be putting on the master a very serious responsibility to hold that he has to keep on board his ship an insubordinate crew who will not obey orders. Section 284 does not create civil rights between shipowners and seamen. It is merely machinery in the implication of the policy of providing for the relief and repatriation of distressed seamen. Whether the master rightly or wrongfully terminated these seamen's contracts, the seamen by remaining on board became trespassers by English law. If they are trespassers by English law they are trespassers for the purpose of this action. These considerations were taken into account by Sellers J. and this court should not interfere with the exercise of his discretion.

COHEN L.J. stated the facts and continued: Mr. Collard, for the defendants, said the order for an injunction ought not to have been made for four reasons, which I put down as follows. First, he says that although the courts have complete

(1) [1913] P. 92, 106.

C. A.
1949
CANADIAN PACIFIC RAILWAY
v.
GAUD.
Cohen L.J.

jurisdiction over foreign merchant vessels in English ports, they will not exercise that jurisdiction where the acts complained of concern the internal discipline of the ship. He relied on passages from text-book writers, and some observations of the learned judges in the case of *Reg.* v. *Keyn* (1). That was a case which was concerned only with the jurisdiction in crime. In civil proceedings the ordinary rule is that these courts will not deprive a plaintiff who seeks their assistance, of relief against a defendant who is within the jurisdiction at the time that the writ is served on him. The fact that foreign law is involved is irrelevant to the question of jurisdiction. It is not disputed that the defendants were all within the jurisdiction when they were served, and in those circumstances it is plain that the English courts have jurisdiction to hear this dispute. In making these observations, I am not forgetting that this court sometimes stays proceedings at the instance of a defendant, on the ground of " forum conveniens " ; but we have no such application before us, and nor has my attention been called to any circumstances which lead me to believe that such an application would succeed. Mr. Collard stressed the peculiar nature of the contract between sailor and shipowner, and referred to the Canadian legislation regulating it, but these considerations seem to me relevant only to the question whether the court should in its discretion grant an injunction, and do not affect the question whether the court should exercise the jurisdiction which it undoubtedly has. For that reason I think Mr. Collard's first point fails.

His second point is that the courts will not grant an injunction which may have the effect of compelling the defendants to commit an illegal act, or which will assist the plaintiffs in committing that illegal act, or which would be oppressive. Mr. Collard dropped the first part of his second point, so far as this case is concerned, because he admitted that as it now appears that all the defendants are British subjects, they will not be committing an illegal act by going ashore if the injunction is granted. He relied, however, very strongly on the second branch of his second point, namely, that if the court grants an injunction, it would be assisting the plaintiffs in committing an illegal act. That depends on the construction of certain sections in the Canada Shipping Act of 1934. Section 284, sub-s. 1, enacts that the master of a ship registered in Canada shall not discharge a seaman at any place out of Canada (except at a port in the country in which he was shipped), unless he previously obtains, endorsed on the agreement with the crew, the sanction of the proper authority as defined by s. 2, but that sanction shall not be refused where the seaman is discharged on the termination of his service. Sub-section 3 is important, and it reads as follows: "If the master of a ship fails to comply with this "section, he shall, in respect of each offence, be guilty of an "indictable offence, and in any legal proceeding for the offence "it shall lie on the master to prove that the sanction was "obtained or could not be obtained or was unreasonably "withheld."

---

(1) (1876) 2 Ex. D. 63.

[His Lordship then referred to s. 290, which he said dealt with leaving a seaman behind and was not relevant to what the court had to decide, because it did not arise until the ship had left the port, and s. 297 dealing with the question of forcing ashore, which could only assist Mr. Collard's argument if these seamen were wrongfully discharged.] He continued: It is the true construction of s. 284 on which really, I think, mainly depends the answer to the question of how we ought to deal with this appeal. I quite agree with what Mr. Collard argued in the first instance, that s. 284, sub-s. 1, is, taken by itself, absolute in its terms, and that unless sanction is obtained as therein prescribed, the master would commit a breach of that section if he discharged the men, and that a discharge without that sanction is a serious matter by reason of the very heavy penalties which can be applied under the appropriate section, to which Mr. Collard called our attention; but I do not think it would be right or proper to construe sub-s. 1 without referring to sub-s. 3 of s. 284; that sub-section provides: "If the master of a ship fails to comply with this "section, he shall, in respect of each offence, be guilty of "an indictable offence, and in any legal proceeding for the "offence it shall lie on the master to prove that the sanction "was obtained." I am stopping there for a moment; it is perfectly plain that if the sanction is obtained, there has been no offence at all, and it seems to me a matter of necessary implication that the master also establishes that no offence has been committed if he proves that sanction could not be obtained or was unreasonably withheld. Section 2, para. 73, defines the "proper authority" whose sanction has to be obtained and it is quite plain from that section that in the particular case with which we are dealing, the proper authority is the superintendent defined in the Merchant Shipping Act, who was then an officer under the control of the Board of Trade, and who now, by reason of the creation of the Ministry of Transport, is under the control of the Ministry. The Canadian Act cannot compel the superintendent to act, and the first question is whether he was allowed by the British authorities to act. I quite agree with Mr. Collard that the original evidence on that point is not satisfactory, but we have had before us further evidence in the form of an affidavit by John Peter Sigvaldason, which I need not read, but I must refer to the correspondence which he exhibited to that affidavit. On May 5, the plaintiffs applied to the High Commissioner for information as to the position, the relevant paragraph being in these terms: "In view of the refusal by the "superintendent at the Connaught Road Office to assist "the company and the master in complying with these "formalities of Canadian law, it is requested that an inquiry "be made by your office of the Ministry of Transport in London "to ascertain whether or not their officers are permitted "to carry out, in the present case, the formalities laid down "by the Canada Shipping Act. If the Ministry of Transport "will not allow their officials to assist in this present case "it is desired to have a definite statement to this effect which "can be placed before the High Court, if necessary, in the "course of the proceedings already mentioned." It is to be observed that that letter asks for information in regard to a specific case. It was passed on by the High Commissioner to the Ministry of Transport, and on May 7, 1949, a Miss Churchard, who we were told is the Assistant-Secretary in charge of the appropriate department, wrote to the High Commissioner a letter in which she said, first, that the Superintendents of Mercantile Marine Offices in the United Kingdom are not authorized to act under the Canada Shipping Act, 1934; she continues: "The Superintendents are, "however, authorized to perform, on request, the usual "services for Canadian ships under the United Kingdom "Merchant Shipping Acts. Under those Acts, the Superin"tendent has no power to discharge a seaman in a port in "the United Kingdom before the termination of the articles "of agreement without the consent of the seaman. In a "case such as that of the *Beaverbrae*, the Superintendent "may effect the engagement of a new crew on the Canadian "articles of agreement and may certify at the time the ship

C. A.

1949

Canadian Pacific Railway v. Gaud.

Cohen L.J.

" is due to sail the master's statements as to the reasons " for leaving behind seamen who are still on the articles and " have not been discharged in front of the Superintendent."

Mr. Collard asked us to take the view that, having regard to the fact that the inquiry was confined to the present case, this letter, on its true construction, might merely mean that in the present case the Marine Superintendent was withholding the sanction, and he said that if that was what was happening, it could not be decided properly whether it was unreasonably withheld, except at the trial. I find myself quite unable to accept that view; I think it is plain that Miss Churchard is saying that the Ministry of Transport will not allow the Marine Superintendents to discharge the particular function which it was sought to impose upon them by s. 284 of the Canada Shipping Act. Mr. Collard also argued that if that was the order which the Ministry of Transport had given to the Marine Superintendents, it was an order which they had no right to give, having regard to the terms of the Merchant Shipping Act, and the plaintiffs could have obtained by mandamus procedure an order on the Marine Superintendent to function. I doubt very much whether that argument is well founded, but whether it be well founded or not, I cannot think that the plaintiffs are bound to proceed to the length of seeking to obtain a mandamus against an officer of the Crown in England before they can satisfy the court that the sanction could not be obtained. It seems to me that the letter of Miss Churchard is, so far as the evidence before us goes, conclusive that the sanction could not be obtained. For that reason it seems to me that, without deciding anything as to what may happen on further evidence, there is no evidence on which we could hold that by granting the injunction we should be assisting the plaintiffs in committing an illegal act.

I have still to deal with the last branch of Mr. Collard's second point, namely, the suggestion that we should be enabling the plaintiffs to do something which is oppressive. I do not think that this is really a separate point at all. The fact that the order would involve expelling Canadians from a Canadian ship is a factor for the judge to consider when exercising his discretion; but he must also consider whether, if the evidence shows that the men are trespassers, they should be allowed to continue their trespass to the prejudice not only of the owners, but also of the Port of London Authority and those seeking to be supplied with the food which the ship was bringing to this country. It seems to me beyond doubt that the compulsory detention of this ship in an unloaded condition, and without the possibility of vacating the berth, is prejudicial to the proper conduct of the Port of London. I propose, therefore, to leave this point until I deal with the last of Mr. Collard's points, namely, the question whether the facts justify interlocutory relief.

Mr. Collard's third point is that the defendants are not trespassers, on the ground that their articles have never been validly terminated. I desire to deal with this point as shortly as possible; I do not want to say anything to prejudice the position of the parties if the action comes to trial. It is perhaps enough to say that on the evidence as it stands, it seems to me to show that the defendants had committed a clear breach of the articles. Assuming that we decided that the plaintiffs were also in breach, in negotiating with the rival union, that does not justify the defendants in continuing to refuse their services and thus commit further breaches of the articles. Two wrongs cannot make a right, and really this point comes back to the proper construction of s. 284. For the reasons which I have already given, it seems to me that on the evidence now before us the plaintiffs are not in breach of s. 284, and this point also fails. The master had, on the evidence that we have heard, a right to discharge the men, and in choosing to remain on board as they have done, the men, on the evidence before us, although they may be able to adduce evidence to prove the contrary at the trial, are trespassers on the ship.

Mr. Collard's fourth point raises the question whether interlocutory relief should be granted. I entirely agree with what he said at the end of his argument, that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted. He readily conceded that point, in view of a decision of this court in *Thompson* v. *Park* (1). He said, and said rightly, that that case was a very special case; but I am quite sure that argument was presented to the learned judge in the court below. The granting of interlocutory relief is a matter of discretion, and this court does not lightly interfere with the exercise of discretion by the judge below. We were referred to a passage in Kerr on Injunctions, to which I do not think I need refer; broadly speaking it says that the object of an

(1) [1944] K. B. 408.

C. A.
1949

CANADIAN PACIFIC RAILWAY v. GAUD.

Cohen L.J.

interlocutory injunction is to preserve the status quo, and the court takes into account the balance of convenience. Mr. Collard says that the balance of convenience is plainly in favour of refusing the injunction. First of all he says that the plaintiffs have another remedy in s. 573 of the Canada Shipping Act; that section is in these terms, so far as relevant: "A court "(in this Act called a naval court) may be summoned by any "officer in command of any ship belonging to His Majesty, "on any foreign station, or, in the absence of such an officer, "by any British Consular Officer, in the following cases that "is to say—(i) Whenever a complaint which appears to that "officer to require immediate investigation is made to him "by the master of any ship registered in Canada by a certified "mate, or by any one or more of the seamen belonging to "any such ship." Mr. Collard says that from the Canadian point of view London is a foreign station, and the master could have made a complaint to the officer, I suppose, of any of His Majesty's ships, and that officer could—he is not under any obligation to do so, but he could—have summoned a court to investigate the complaint, and that court could have dealt with the matter under the powers conferred by the subsequent section. The first answer given by Sir William McNair was that London is not a foreign station, and having regard to the fact that we are dealing here, not with ships belonging to His Majesty in right of Canada or any Province thereof, but with any of His Majesty's ships being part of the Royal Navy, I think this argument of Sir William is well founded. Apart from that, I think we have also properly to take into consideration the fact that if this relief were available to the master, it was equally available to the men, who could have invoked the aid of this court at any time since April 3, when this dispute arose, but they have not done so. Furthermore, it does not follow that when a complaint was received, an officer of His Majesty's ship would act upon it. I cannot help thinking that any officer who had received a complaint under s. 573 would probably say: "There are "perfectly good courts sitting in the Strand to deal with any "complaint you have to make; we cannot properly interfere" —so I do not think the terms of s. 573 afford any ground upon which we should say that Sellers J. came to a wrong decision, and I may add that I should be particularly reluctant to dispose of the matter on that ground, as his attention was not called to the section.

A further point made by Mr. Collard was that it was extremely oppressive to compel these Canadian subjects to transfer themselves from what was called "Canadian soil" to the soil of this country, against their will. As counsel put it: "Will the court go so far as to order the men to leave their "country?" Might it not be said that it is equally oppressive to condemn this ship to indefinite paralysis? Then, he said that there was no evidence, if the men were not on board the ship, that the ship could be unloaded or moved. That may be true, but it is quite plain that it cannot be moved to another port so long as these men remain on board. It seems to me quite impossible to say that there is no evidence on which the court below could reasonably hold that the balance of convenience was in favour of granting the injunction, and we have in this action to bear in mind that Mr. Collard frankly admitted that if the defendants were wrong, they could not make compensation in cash. Moreover, if we do not make the order, the ship will be paralysed indefinitely, and it will be impossible for the owners even to try to get another crew. The public convenience, as well as the convenience of the owners, will suffer. Finally, I would add that whereas, if the defendants are wrong, they cannot make compensation, if the plaintiffs are wrong, the defendants will be able to recover their wages and any other relief to which they are entitled under the Act or under the ordinary law. Moreover, in the meantime the Canadian Pacific Railway Company are liable for their maintenance and repatriation.

In those circumstances, while bearing in mind the reluctance with which one grants a mandatory injunction on an interlocutory application, I think it is impossible to interfere with the exercise of the discretion of Sellers J. and this appeal must be dismissed.

SINGLETON L.J. At an early stage in his argument, Mr. Collard said that he would like more time to consider the various questions of law which arose. That was coupled with his submission that these matters were more fit to be dealt with on a final hearing, rather than on an interlocutory application. The argument in this court started on Monday morning; this is Wednesday noon. During these two days Mr. Collard has had further time to consider any question which arises for consideration. If we thought that there was need for further time, I am quite sure that it would have been

C. A.

1949

Canadian Pacific Railway v. Gaud.

Singleton L.J.

granted, and any application would have had full consideration but as the matter has developed, we have had very full and complete argument on both sides. This is a case of great importance, as has been pointed out to us, and I have reached the conclusion that it ought to be disposed of, and disposed of speedily. Learned counsel for the defendants put forward two grounds on which he submitted this court should refuse to exercise jurisdiction. One of those grounds was that the ship was a Canadian ship and the defendants were Canadian seamen; and the dispute that had arisen between the owners of the ship and the seamen could more properly be determined by the courts of some part of Canada. It is true to say that the dispute could be determined in Canada—but when? How much time would elapse before there was a determination? In the meantime ship and cargo are both held up in the Port of London. I do not believe that it is any part of the duty of the courts of this country to run away from deciding a question in such circumstances, when one party, the owners of a ship now in the Port of London, comes forward and asks for help or relief.

Another ground on which Mr. Collard suggested the courts should refuse jurisdiction was that there was open to the shipowners the procedure suggested, or the procedure laid down, in s. 573 of the Canada Shipping Act. My Lord has referred to that section; it is the section which enables a naval court to be summoned. That section is in almost precisely the same terms as s. 480 of the Merchant Shipping Act of 1894, under which an officer of any of His Majesty's ships on any foreign station or, in the absence of such an officer, any consular officer, may summon a naval court in certain cases. He may do so; he is not bound to do so. If he does so, the naval court so summoned may exercise the powers conferred by the Act. I agree with the remark of Sir William McNair that it is somewhat fantastic to think of summoning a naval court in the Port of London to deal with a dispute of this kind, when the High Court is able and willing to deal with it, and to deal with it expeditiously. I do not know that the question whether s. 573 of the Canada Shipping Act of 1934 applies to the Port of London has ever been raised before. These considerations, however, do not dispose of the submission of Mr. Collard. It is, I think, beyond doubt that each of these sections was intended to provide a speedy means of determining certain questions when a British ship, on the one hand, or a Canadian ship, on the other hand, was in or near any foreign station and there was no suitable court to which a party could resort, or which could deal with the matters conveniently. I would draw attention to sub-s. 3 of s. 573 of the Canada Shipping Act, which is similar to sub-s. 3 of s. 480 of the Merchant Shipping Act, as showing what may be dealt with by naval courts so summoned.

Section 573 of the Canada Shipping Act differs in one respect from s. 480 of the Merchant Shipping Act, and I think only in one respect; that is in the introduction of a comma, and Mr. Collard has placed some reliance upon that comma. Why it was introduced—whether by accident or otherwise—I do not know. If a naval court is to be summoned by an officer in command of any ship belonging to His Majesty, it must be so summoned by an officer in command of any ship belonging to His Majesty on a foreign station. The words "on any foreign station" are used in relation to the officer in command, or rather, in relation to the ship of His Majesty, of which the officer is in command. That is clearly so under s. 480 of the Merchant Shipping Act of 1894, and I think the same applies under s. 573 of the Canada Shipping Act of 1934, even though the introduction of a comma after the word "Majesty" lends some slight complication. I cannot think that an officer in command of one of His Majesty's ships in London is, or that his ship can be regarded as, "on "any foreign station." That is sufficient to dispose of the point raised on behalf of the defendants under s. 573 The submission of Sir William McNair is unanswerable, and there is no power to appoint a naval court in the Port of London to determine this question. Can anyone conceive that if an application was made in relation to a dispute of this kind arising in the Port of London, a naval officer would appoint a naval court? Perhaps I should add that s. 574 of the Canada Shipping Act, to which we were referred, only provides for procedure where a naval court has been properly summoned under s. 573, and summoned to sit at a place which is within His Majesty's dominions other than Canada.

It is said by Mr. Collard that the master commits an indictable offence under s. 284 of the Canada Shipping Act if he discharges seamen at any place out of Canada, unless he obtains the sanction of the proper authority, namely, under definition (73) of s. 2, "a superintendent as defined by the

C. A.

1949

Canadian Pacific Railway v. Gaud.

Singleton L.J.

"Merchant Shipping Act." I will not read the section; my Lord has already done so. It is submitted that this court ought not to assist the master to commit an offence under s. 284 of that Act. It appears from the affidavit of the master that he endeavoured to arrange the procedure specified by s. 284, but it was found to be impossible, and the letter from the Ministry of Transport of May 7, states that the superintendents of Mercantile Marine Offices in the United Kingdom are not authorized to act under the Canada Shipping Act, 1934, and that the superintendent has no power to discharge a seaman—I take it that means a Canadian seaman—in a port in the United Kingdom before the termination of the articles of agreement, without the consent of the seaman. In such circumstances, it would seem that the intention behind sub-s. 3 of s. 284 is that no offence was committed by the discharge, though the sub-section does not say so in so many words. Section 284 is in Part IV of the Act, which contains provisions for the relief and repatriation of distressed seamen and seamen left abroad. Mr. Collard suggested that it gave, or might give, a right of action to a seaman who was discharged contrary to the terms of s. 284, but I am not sure that that is so. There is another remedy provided, but it is unnecessary to go into that matter.

I do not propose to deal with the facts of this case beyond what has been said already, for there may have to be a trial. I draw attention to paras. 21, 22 and 23 of the master's affidavit, which show that the men were ordered to report for work and were told that the alternative was dismissal. They failed to report; they declined to work or to obey orders, and they refused to leave the ship. This was a ship belonging to Canadian shipowners, managed by the Canadian Pacific Steamship Company of the Port of Liverpool. The case for the defendants is that they have been discharged wrongfully, in that the provisions of the statute have not been complied with. As Buckley L.J. said in *The Olympic* (1): "'Discharged' means not 'paid off,' but 'dismissed'"; in other words, it covers the case of a man who is turned off his ship. In the ordinary case of a workman who is wrongfully dismissed, he is not entitled to remain in possession of a house which he occupies by reason of his work and as part of his emoluments; that is, I think, clear, and it was the basis of the decision in *Lake* v. *Campbell* (2) in which case Erle C.J. said: "The "plaintiff had no estate in the house; there was no relation

(1) [1913] P. 92, 106.

(2) (1862) 5 L. T. 583, 584.

" between them of landlord and tenant, and the defendant " had a perfect right to turn him out. There was no violation " of any right of property, and no cause of action as to the " retaking of the house; the plaintiff was requested to go " out, which he refused to do, and the defendant, therefore, " had a perfect right to remove the furniture from his premises " Williams J. said: " Then as to the second point, the plaintiff " had no right to retain possession of the house after he had " ceased to be in the defendant's service; therefore, after he " had been requested to leave the house and remove his goods, " he became a trespasser in not doing so, and the defendant " had a right to remove the goods himself." Willes J. was of the same opinion. The man in such a case has, of course, a right of action, and if he succeeds in obtaining damages, those damages include compensation for the loss of the use of the house, which he would have retained if his employers had not broken the contract.

The principle is the same in the case of the seamen, and so far as I can see, no provision in the Canada Shipping Act has altered this. The relationship between shipowner and seaman is determined by the articles, and if the shipowners have wrongfully dismissed or discharged members of the crew, they are liable in damages to them. Section 286 of the Canada Shipping Act provides for maintenance and repatriation of a seaman " where his service terminates at a port out of " Canada otherwise than by his consent."

It is then said by Mr. Collard that the facts do not justify interlocutory relief. With this I cannot agree. Accepting, as I do, the submissions of Sir William McNair as to the position in law, it seems to me that this is eminently a case for interlocutory relief, and a case in which relief ought to be given to the shipowners. Their ship is of value to them, and furthermore, it is in the public interest that they should have the use of that ship, whether the use be to carry food to this country or to carry refugees from Germany across the Atlantic. The rights of the defendants are adequately protected by statute, as well as by the undertaking of the shipowners. In my view the order of Sellers J. was quite right, and this appeal should be dismissed.

Appeal dismissed.

Solicitors for defendants: *Gaster and Turner.*
Solicitors for plaintiffs: *Wm. A. Crump and Sons.*

A. W. G.

C. A.

1949

Apr. 26, 27.

Lord Greene M.R., Asquith and Denning L.JJ.

STUCHBERY AND OTHERS *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LD.

Landlord and tenant—Premises used as solicitors' office—In addition the trade or business of agents for insurance companies and building societies carried on—Lessees carrying on a "profession"—No separate goodwill proved in respect of trade or business—Not entitled to compensation or new lease—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, 17, *sub-ss.* 1, 3.

The applicants, a firm of solicitors, were the lessees of premises, where they had carried on their practice of solicitors since 1935. They also acted as agents for insurance companies and building societies and one of the partners acted as clerk to the justices. Their lease expired in September, 1948, and they applied under the Landlord and Tenant Act, 1927, for the grant of a new lease or for 3,000*l.* as compensation for loss of goodwill. The application was referred to a referee under the Act in the usual way. The referee found that the applicants were carrying on the trade or business of agents for insurance and building societies. That conclusion was affirmed by the county court judge. The referee further found that the applicants had not established that the necessary goodwill had attached to the premises to entitle them to a new lease, or, alternatively, to compensation. The county court judge took a different view and held that the necessary goodwill had been established in respect of the applicants' business as solicitors and that they were entitled to a new lease for fourteen years from September 15, 1948. The landlords appealed.

Held, allowing the appeal that (1.) the carrying on of a solicitors' business was the carrying on of a "profession" and was not the carrying on of a "trade or business" within the meaning of that phrase in the Landlord and Tenant Act, 1927, (2.) where a tenant carries on both a profession and a trade or business on demised premises, it was not sufficient for him to show that goodwill existed in respect of the profession and the trade or business regarded as one business. It was necessary for him to show that adherent goodwill has become attached to the premises referable and referable only to the trade or business. He was not entitled to include as relevant goodwill any goodwill in respect of the profession. (3.) On the evidence in this case, it was not possible to hold that there was any severable and recognizable goodwill attached to the premises and attributable and attributable alone to the carrying on by the tenants of the trade or business (if in fact it were a trade or business) of insurance agents and building societies' agents and of clerk to the justices, apart from the goodwill attached to the carrying on of their business of solicitors. Accordingly, they were not entitled to claim compensation or a new lease under the Landlord and Tenant Act, 1927.

C. A.
1949

STUCHBERY
v.
GENERAL
ACCIDENT
FIRE AND
LIFE
ASSURANCE
CORPORATION, LD.

APPEAL from Windsor county court.

The applicants, T. W. Stuchbery & Son, a firm of solicitors, were the tenants under a lease expiring on September 15, 1948, of No. 15, Park Street, Windsor, where they had been carrying on business as solicitors since 1935. The appellants, the General Accident Fire and Life Assurance Corporation Ld., were the landlords of the premises. The applicants applied under the Landlord and Tenant Act, 1927, for 3,000*l.* compensation for loss of goodwill or for a new lease of the premises. The applicants in connexion with their business of solicitors acted as agent for insurance companies and building societies and one of the partners acted as clerk to the justices. The facts are more fully stated in the headnote and the judgment of Lord Greene M.R.

The county court judge, varying the order of the referee under the Act, made an order for the grant of a new lease of the premises to the applicants for a term of fourteen years from September 15, 1948. The landlords appealed.

F. H. Lawton for the appellants, the landlords. Solicitors do not, as such, carry on a trade or business but a profession and premises occupied by them are, by s. 17, sub-s. 3, of the Landlord and Tenant Act, 1929 (1), not to be deemed to be

---

(1) Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The "tenant of a holding to which "this Part of this Act applies "shall, if a claim for the purpose "is made in the prescribed manner ". . . . be entitled, at the termination of the tenancy on quitting "the holding, to be paid by his "landlord compensation for goodwill if he proves to the satisfaction of the tribunal that "by reason of the carrying on "by him or his predecessors in "title at the premises of a trade "or business for a period of not "less than five years goodwill "has become attached to the "premises by reason whereof "the premises could be let at "a higher rent than they would "have realised had no such "goodwill attached thereto."

Section 5, sub-s. 1: "Where "the tenant alleges that, though "he would be entitled to compensation under the last "foregoing section, the sum which "could be awarded to him under "that section would not compensate him for the loss of goodwill "he will suffer if he removes to "and carries on his trade or "business in other premises, he "may in lieu of claiming such "compensation, at any time "within the period allowed for "making a claim under the said "section, serve on the landlord "notice requiring a new lease "to the premises at which the "trade or business is carried on "to be granted to him."

Section 17, sub-s. 1: "The "holdings to which this Part "of this Act applies are any "premises held under a lease . . . . "and used wholly or partly for

C. A.

1949

STUCHBERY v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LD.

premises used for carrying on a trade or business. The provisions of s. 4 dealing with compensation for goodwill attaching to premises used for a trade or business and those of s. 5 enabling a lease to be granted when compensation is found to be insufficient, do not therefore apply so far as the goodwill of a profession is concerned. No separate question here arises as to the reasonableness of granting a new lease instead of compensation should the finding of the county court judge as to goodwill be right. In the case, however, of compensation for goodwill, the goodwill must be entirely in respect of a trade or business and it must adhere to the premises. The proper way of approaching the matter is laid down by Scrutton L.J. in *Simpson* v. *Charrington & Co. Ld.* (1). As regards the premises in the present case, the solicitor carrying on the business at Windsor was clerk to the justices but that is not carrying on a business. The only business that can be said to have been carried on is in respect of building societies and agencies for insurance companies. The latter was a small matter and the main work done for building societies was that of the Maidenhead Building Society, and of late the solicitors have only been paid for legal business arising in regard to persons introduced by them at the Windsor branch. Any goodwill in respect of these matters did not attach to the premises so as to give rise to a claim for compensation. That is what the referee held but the county court judge held the contrary. However that might be, the judge in deciding to grant a new lease took into account goodwill not only in regard to the subsisting matters above referred to but also goodwill in respect of the profession of solicitors. This is clearly wrong. The only goodwill that could be taken into account was at most that arising from business activities. It is contended, however, that there is really no goodwill adhering in respect of these activities. Further, in considering the compensation to be paid, the court has to see whether the value of the premises is enhanced so far as the landlord is

---

"carrying on thereat any trade "or business . . . ."

Sub-section 3: "For the purposes of this section, premises "shall not be deemed to be "premises used for carrying on "thereat a trade or business— "(*a*) by reason of their being "used for the purpose of carrying "on thereat any profession; ". . . . Provided that, so far "as this Part of this Act relates "to improvements, premises regularly used for carrying on the "profession shall be deemed to "be premises used for carrying "on a trade or business."

(1) [1934] 1 K. B. 64.

concerned so that he could let the premises at a higher rent: see s. 4, sub-s. 1, of the Act. Here the county court judge concerned himself with the increased value of the premises to the solicitors. In that he was certainly in error. If the view be accepted that there is a business being carried on in respect of insurance and building activities, that was entirely subsidiary to the carrying on of the solicitors' profession and, as already contended, the county court judge misdirected himself in taking into account the goodwill of that profession. [He was stopped.]

C. H. Duveen and *A. L. Figgis* for the defendants. The contentions on behalf of the defendants are (1.) that the county court judge was entitled to take into account the solicitors' goodwill; and (2.) that, even if this were not so, there was evidence before him to support a finding that there is goodwill attached to the premises in respect of the business activities.

[LORD GREENE M.R. This court is not concerned to decide questions of fact and, if the first contention is wrong, the question would arise whether the county court judge could on the facts come to the conclusion he did, had he directed his mind aright.]

In s. 4 of the Act the expression "trade or business" has its usual English sense which includes a profession: *Rolls* v. *Miller* (1). The proviso to s. 17, sub-s. 3, relating to improvements supports this view. It is true that a profession is not to be taken into account, in relation to a holding under s. 4. But when, as in this case, there is a business being carried on as well as a profession, the goodwill attributable to the profession can be taken into account with the goodwill of the trade or business. If that were not so, why in s. 17, sub-s. 3, were premises not to be deemed premises used for carrying on thereat a trade or business if they were used for the purpose of carrying on any profession, thus making it apply only for the purposes of s. 4 instead of for the purposes of the whole Act. It is a ridiculous position if the goodwill attaching to premises has to be split so that it is only the goodwill attached to the trade or business carried on there that has to be taken into account.

F. H. Lawton in reply. If it is not permissible to take into account the goodwill of the solicitors' business, the case should be remitted to the county court judge for a new trial

(1) (1884) 27 Ch. D. 71.

to determine whether there is any goodwill adherent to the premises in respect of the trade or business carried on by the applicants apart from their solicitor's business.

LORD GREENE M.R. This appeal arises out of an application made under the Landlord and Tenant Act, 1927, for the grant of a new lease or, alternatively, for compensation. The applicants are a well-known and very successful firm of solicitors who carry on their profession both at Maidenhead and at Windsor. The application relates to part of their premises at Windsor, namely, No. 15, Park Street. Their offices at Windsor consist of certain rooms in No. 16 and certain rooms in No. 15. Each number has a separate entrance. The Windsor business started as an off-shoot of a Maidenhead business and, as I gather from the evidence, has outstripped the parent business and has now become the more lucrative part of their business.

The application relates only to No. 15. No. 16, which comprises the larger part of their offices, is held under a lease which still has seventeen years, I think, to run. The approaching termination of the tenancy of their offices at No. 15 led them to make application under the Landlord and Tenant Act, 1927, for the relief which I have mentioned, which is limited to that particular part of their offices.

I say at once, although perhaps it is irrelevant to say so, that I can well understand the desire, and the reasonableness of the desire, of the applicants to obtain whatever protection they can obtain owing, very largely, to two circumstances: Accommodation in Windsor is very difficult to get, and the accommodation which they at present have is undoubtedly in a part of the town very convenient for a solicitors' business and in its general nature and lay-out has got that atmosphere which one so often expects to find in a provincial town in a neighbourhood devoted to that class of business. Therefore, I say I can well understand that they want to use, and are entitled to use, any means that they lawfully can to obtain security of tenure. The case which they tried to make was a case under the Landlord and Tenant Act, 1927.

Another point which I can well understand is that they feel if No. 15, which is the smaller section of their office accommodation but nevertheless of importance to them, is taken away from them, the remaining accommodation in No. 16 which is still left to them would not be adequate for their very large and very likely expanding business.

On those two parts of their premises they carry on the profession of solicitors. What I may call the strictly solicitors' business—I use that word without prejudice—forms the larger part of their activities and produces far and away the larger part of their profits. In connexion with that business, they also have other activities. They, like most solicitors, or like a great many solicitors, perhaps more in the provinces than in London, act as agents for insurance companies. They also act as agents for certain building societies, and I shall have to say a word or two later about those two activities. One of the partners is also a magistrate's clerk and he carries on those duties as well.

The application followed the usual course. It was referred to a referee under the Act and the referee reported to the judge. When the matter came before the county court judge, he accepted the report in some respects, in other respects he declined to accept it, and he came to certain conclusions of his own. As a result of the conclusions to which he came, he made an order under which the applicants obtained the right to a new lease of No. 15. The details do not matter.

There are certain questions that arise on this appeal and it is necessary, I think, to draw a distinction between them. It will be remembered, and I shall come presently to a more careful examination of the Act, that the compensation for which the Act provides is compensation in respect of what is called "goodwill." I will not say more about it at this moment than that. In any case, where it is shown that the tenant, the applicant, is entitled to compensation, he may also get, if the circumstances warrant it, and the conditions laid down in the Act are complied with, instead of compensation an order entitling him to a new lease of the premises. The referee had before him, therefore, firstly the question whether there was carried on on the premises, No. 15, what the Act describes as "a trade or business," because it is only in respect of what are called "trades or businesses" that the Act comes into operation. The referee came to the conclusion that the applicants were carrying on a trade or business, but his finding was based on this that of the actual activities carried on by the applicants at No. 15, part was referable to what can properly be described as "a business," namely, insurance and building society work, commissioners for oaths and the clerkship to the justices. It was in reference to those activities, and those activities alone, that the referee held that the applicants carried on a trade or business. That conclusion was affirmed by the county court judge.

The other crucial matter was whether or not there was the necessary goodwill as required by the statute established on the evidence which would entitle the applicants to make their claim for a new lease or, alternatively, compensation. That issue the referee found against the applicants. It was on that issue that the county court judge took a different view and he found that the necessary goodwill was established.

I have said that those two issues must be kept distinct and I said it for this reason that, when the findings both of the referee and of the county court judge are examined, it will be found that the first question is very largely a question of fact. I will not say it is entirely a question of fact, but it is very largely a question of fact.

The second issue, on the other hand, as it turns out when the judgments are examined, calls for the solution of a problem of law, namely, what is the relevant goodwill which the Act requires to be established in such a case as the present.

As the result of reading the report of the referee and reading the judgment of the learned county court judge and reading practically the whole of the evidence of the partner in the applicant firm who gave evidence on their behalf, and listening to the argument presented to us by Mr. Duveen, I think it is fair to make this comment: Both the report and the judgment and the argument and the evidence were all based on a particular view of the Act, as to what would by the relevant goodwill in circumstances such as these.

Mr. Lawton on behalf of the appellants, the landlords, says that the referee and the judge misdirected themselves in law in holding that it was right in those circumstances to bring into account and pay attention to and give effect to the goodwill of the business of a solicitor as such. That, he said, was based on a wrong construction of the Act.

It was, however, argued by Mr. Duveen—and his evidence, I think, was based on precisely the same view—that once it is shown that a trade or business, as distinct from a profession, is being carried on on certain premises, and if it appears that the applicants carry on in addition to a trade or business a profession, then it is sufficient to establish goodwill to point to the goodwill attaching to the professional activities without the necessity of any reference to the trade or business activities.

C. A.

1949

STUCHBERY
v.
GENERAL
ACCIDENT
FIRE AND
LIFE
ASSURANCE
CORPORATION, LD.

Lord Greene
M.R.

At that stage I think it is convenient to look at the relevant provisions of this Act. Before doing so, I ought perhaps to say this that Mr. Duveen's first argument was to the effect that on the true construction of this Act, the phrase "trade "or business" includes a profession such as an ordinary solicitor's profession. In reference to that, I may say quite generally by way of preface that the question of what the phrase "trade or business" comprises must depend on the true construction of the document, if it be a document, in which it is used. It has got, like any other expression, to be interpreted according to its context and, whereas in some contexts I can well imagine, and indeed, no doubt, it is a fact, that the phrase "business" would include the carrying on of a profession like a solicitors' profession, in other contexts such a profession quite equally clearly is excluded from the phrase "business." Therefore, what we have to discover is not some abstract meaning in the air, but the meaning of the phrase "trade or business" when used in the context of this Act.

The Landlord and Tenant Act, 1927, has as its short title: "An Act to provide for the payment of compensation for "improvements and goodwill to tenants of premises used "for business purposes, or the grant of a new lease in lieu "thereof; and to amend the law of landlord and tenant." Section 1 of the Act lays down the principle that, in the circumstances mentioned there, the tenant of what is called "a holding to which this Part of this Act applies" is entitled to obtain compensation for improvement which he has made on the demised property. I need not go into the details of that because that is not the section with which we are concerned.

Section 4, in the relevant part of it, says this: "The tenant "of a holding to which this part of this Act applies shall, if "a claim for the purpose is made in the prescribed manner "(i) in the case of a tenancy terminated by notice, within "one month after the service of the notice on the tenant; "and (ii) in any other case, not more than thirty-six nor "less than twelve months before the termination of the "tenancy; be entitled, at the termination of the tenancy on "quitting the holding, to be paid by his landlord compensation "for goodwill if he proves to the satisfaction of the tribunal" —that is the county court in this case—"that by reason "of the carrying on by him or his predecessors in title at the "premises of a trade or business for a period of not less than "five years goodwill has become attached to the premises by "reason whereof the premises could be let at a higher rent "than they would have realized had no such goodwill attached "thereto." Then follows a proviso which limits the amount of the compensation to such addition to the value of the holding as was the direct result of the carrying on of the trade or business.

As I pointed out, that section relates to compensation in the circumstances mentioned, and the circumstances in which the relevant goodwill is to arise are very strictly and carefully circumscribed. The goodwill in question must be proved by the applicant to have arisen by reason of the carrying on of a trade or business and that goodwill must have become attached to the premises by reason whereof the premises could be let at a higher rent.

Speaking quite broadly, the mischief at which this part of the Act was aimed, and that also is true of the part which deals with compensation for improvements, was to deal with the case of a landlord acquiring through the activities of his tenant, either by improving the property or by creating in the property, and adherent to the property, a goodwill of which the landlord would take the benefit when the lease came to an end. It was obviously thought unjust by the legislature that the landlord should obtain that type of unearned increment on the termination of a lease and there have been, no doubt, cases where a crafty landlord, observing that a tenant had created a very good business and had acquired a goodwill adherent to the premises in that way, deliberately brought the lease to an end, or declined to renew it, in order to secure the benefit of that increased value to himself.

There are one or two things to which I think I should also refer here. Paragraph (*d*) of s. 4, sub-s. 1, says: "The "tribunal shall, in determining the amount of compensation "for goodwill"—then I need not deal with the first sub-paragraph—"(ii) disregard any value which is attributable "exclusively to the situation of the premises." Moreover, the very definition of "goodwill" appears to me to exclude the relevance of any personal goodwill attributable to the fact that the business which is said to have attracted the goodwill was being carried on and owed its prosperity merely to the personal qualifications of the person carrying it on. The reason I say that is because the Act is contemplating something that will stick to the premises and will not follow the tenant when he leaves those premises and goes elsewhere, or will not die because he has gone away. It frequently happens when a man has got a personal goodwill that it will follow him when he goes elsewhere. If he gives up business or goes to another town it just dissolves into the air.

Section 5 deals with the case of applications for the grant of a new lease and it applies, taking it quite shortly, where it is shown that compensation under s. 4 would not compensate the tenant for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises. In such a case, he is entitled, in lieu of claiming compensation, to serve a notice requiring a new lease of the premises. Where such a notice is served, says sub-s. 2, the tribunal, if it considers that the grant of a new tenancy is in all the circumstances reasonable, may " order the grant of a new tenancy for such " period (being a term of years absolute) not exceeding " fourteen years and on such terms as the tribunal may " determine to be proper." Then sub-s. 3 says this : " Where " the tenant is the applicant, the grant of a new lease under " this section shall not be deemed to be reasonable (*a*) unless " the tenant proves that he is a suitable tenant and that he " would be entitled to compensation under the last foregoing " section."

The matters, therefore, which have to be established in order to qualify the tenant for a new lease are the matters, to begin with, which would qualify him to compensation, and that throws him back, in considering whether he is or is not entitled to a new lease, to the question : Is he or is he not entitled to compensation ?

Then I do not think I need read anything else until I come to s. 17. The importance of s. 17, or what I may call the initial importance of it, is this, as it seems to me. As I have pointed out, s. 1 relating to improvements and s. 4 relating to goodwill, relate to cases where the applicant is the tenant of a holding to which this Part of this Act applies. That makes it necessary, of course, to provide in the Act what may be called an interpretation section which will show what are the holdings to which this Part of the Act applies, and that is provided in s. 17, sub-s. 1, in these words : " The holdings to which " this Part of this Act applies are any premises held under " a lease "—then I can skip some words—" and used wholly

C. A.

1949

STUCHBERY v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LD.

Lord Greene M.R.

" or partly for carrying on thereat any trade or business." Therefore, before the tenant can begin to have any status to make a claim, he has to show that he is the tenant of a holding within that definition, and that definition includes this qualification, that it must be premises used wholly or partly for carrying on thereat a trade or business.

Mr. Duveen suggested that the only useful force of this section was to define a holding and was not intended to be a definition of a tenant. But that seems to me to be an argument which is not maintainable for this reason that, before the tenant can have a locus standi to make an application, he must allege and prove he is the tenant of the holding, and, unless he can show the holding of which he is a tenant comes within the definition of s. 17, sub-s. 1, his application does not begin to get on its feet.

The next part of that section which I need read is part of sub-s. 3: " For the purposes of this section "—that is to say the purpose of the definition of the holding with which the section is concerned—" premises shall not be deemed to " be premises used for carrying on thereat a trade or business " (*a*) by reason of their being used for the purpose of carrying " on thereat any profession." Then after (*b*), which I need not read, comes this: " Provided that, so far as this Part " of this Act relates to improvements, premises regularly " used for carrying on a profession shall be deemed to be " premises used for carrying on a trade or business."

Then sub-s. 4: " In the case of premises used partly for " purposes of a trade or business and partly for other purposes, " this Part of this Act shall apply to improvements only " if and so far as they are improvements in relation to the " trade or business."

I said a moment ago that the meaning of the phrase " trade " or business " must depend upon the particular context in which that expression is found, and if there is anything that the language of this section shows to my mind beyond any possibility of question, it is that the legislature is contemplating a distinct and important difference between a trade or business and a profession. It is left to the tribunal to say whether a particular activity falls within one category or another; but, in all cases where it is essential for the administration of the Act to decide whether an activity falls into one or the other category, that is a task which the tribunal has to perform; and I am bound to say, although there may be difficult cases, I should have thought in general any person with a reasonable knowledge of affairs would not have very much difficulty in saying what the legislature meant in regard to some particular activity. In a case where the context shows a distinction between a trade or business on the one hand and a profession on the other, I should think it would require a very bold man to say that a solicitors' business—I call it business without prejudice—is to be put into the "trade "or business" class and excluded from the professional class, because it is quite clear from the context that the legislature is not contemplating that a particular activity would be in both. Therefore, I think in most cases people would be able to answer the question with regard to a particular activity whether it fell within the professional class or within the trade or business class. It appears to me to be very reasonable that the legislature should have drawn the distinction, which I shall show in a moment, I hope, it has drawn, between professions and trades or businesses, for this reason, that to many minds—and I am bound to confess very largely, perhaps not entirely, to my own—the conception of a profession excludes altogether the idea of a goodwill adherent to premises which will be annexed, so to speak, by the landlord of the premises when the professional man's tenancy comes to an end.

A professional man is selected for his professional skill. It is not like a tobacco shop where casual customers come in and buy a casual packet of cigarettes, or anything of that kind, or a shop where a trade or business is carried on. I am not saying there may not be things which could properly be called a profession where you would not find something in the nature of an adherent goodwill. I do not know, but in the case of a solicitor's profession, I should have thought the very idea of a goodwill adherent to the premises, as distinct from the goodwill of the firm carrying on the profession, would be a novel one which the legislature could scarcely have contemplated. I myself have no difficulty whatsoever in respect of the solicitors' business carried on in coming to the conclusion that the carrying on of the solicitors' business is not the carrying on of a trade or business within the meaning of that phrase in this Act of Parliament. That disposes of Mr. Duveen's first argument.

But it is the second argument on which the greatest stress was laid. It was to this effect: Assuming that "trade or

C. A.

1949

Stuchbery v. General Accident Fire and Life Assurance Corporation, Ld.

Lord Greene M.R.

"business" does not include a profession, yet if you find that something which may properly be called a trade or business is carried on on the premises as well as a profession, then, in ascertaining whether or not there is such a goodwill as the Act contemplates as entitling the tenant to compensation or a new lease, you are entitled to bring into account any goodwill which you can show to be adherent to the premises arising from the carrying on of the profession; in other words, once you have established that the activities carried on comprise a trade or business, then, if you can show that a goodwill has attached to the premises by reason of any of those activities, even if it is referable to the professional side of them, that is enough. With all respect to that argument, I do not accept it. I should say at once that it seems to have been the argument which was accepted by the referee and it is undoubtedly the argument on which the judgment of the learned county court judge is based.

The contrary view is that in a case where it is shown that a trade or business in the statutory sense is carried on, and it is shown or admitted that a profession is also carried on, then the only relevant goodwill for the purpose of the Act is the goodwill referable to the activities comprised within the trade or business to the exclusion of such goodwill, if any, as may be attributable to the carrying on of the profession.

Mr. Lawton's submission on the first of the two points which I mentioned a moment ago as being found in the report and the judgment under review was that on the evidence it was not open to the county court judge to find that the activities in connexion with the insurance, building society, clerk to the justices and commissioners for oaths, constituted the carrying on of a trade or business, because they were merely small minor matters incidental to the carrying on of a solicitors' business, the sort of activities which many solicitors carry on as an off-shoot of their strictly professional business. We took the view that it was not desirable to examine that submission until we had considered the basis of the judgment on the second point to see whether there was a misdirection in law by the learned judge as to the finding of goodwill.

On the assumption that the first of the points I have mentioned is in Mr. Duveen's favour, and it is as the judgment stands in his favour—and in dealing with this point on that assumption I must not be taken to be assenting, but I am assuming that the evidence was sufficient to support a finding that a separate severable trade or business, as distinct from the profession of a solicitor, was being carried on by the applicants on the premises—Mr. Duveen's argument was: Once you have established that, then it becomes irrelevant to look for an adherent goodwill referable, and referable only, to the activities properly described as a trade or business, and it is sufficient to show generally a sort of goodwill without showing that it in any respect or to any extent flows from the trade or business activity as distinct from the profession.

I do not propose to go through the referee's finding, or the judge's judgment, dealing with that. I think I am doing no injustice to either of them if I say that they accepted that argument. The only evidence summarized by the referee and the only evidence before the referee—I shall say a little bit more about that in a moment—was evidence, so far as it related to goodwill, relating to the goodwill of the solicitors' part of the business, or perhaps goodwill relating to the whole of their activities without any attempt to refer any goodwill at all to that part of their activities properly (as I assume) described as the carrying on of a trade or business.

I may also say this that in the evidence of Mr. Hezlett, who was a partner in the applicant firm and who was the principal witness for the applicants, it is again to my mind quite clear that the impression he was under was that the contention Mr. Duveen was clearly putting before us was a proper contention, and on the correctness of that contention he was basing the whole of his evidence.

I hope I may be permitted to say that Mr. Hezlett's evidence was evidence of as frank a description as one would wish to find in a court of law. He gave his answers based as I think they were on a misconception as to his rights, and when he made those frank answers he did not realize, if I may say so, that the answers gave his case away. I do not suggest for a moment that he would have given any other answers if he had known that these would give his case away. He was obviously a witness of complete candour.

I will just avert to a matter which is not directly relevant to this question of goodwill but which I think by itself destroys the applicants' case. I have referred to the section under the Act which entitles the tenant to compensation but says that any value which is attributable exclusively to the situation of the premises must be excluded.

In this connexion I would like to refer to the very frank and clear answers which were given by Mr. Hezlett on the first day of the hearing. I may say by way of explanation that in the claim the applicants were claiming 3,000*l.* compensation for loss of goodwill, and that is their only claim for compensation. As I pointed out, it is necessary for an applicant to establish his right to goodwill before he can begin to talk about a claim for a new lease. The applicants say this in the notice: "The applicants claim the grant "of a new lease of the aforesaid offices and premises and that "they would be entitled to the sum of 3,000*l.* as compensation "for loss of goodwill." I need not read the rest. Mr. Hezlett was cross-examined and I will read one or two questions and answers. One question is: "So, when we have dealt "with the situation of the premises and your personal "qualities, the two being magnets to attract work, there is "not much left, is there, which is purely attached to the "premises as premises?" Answer: "If you take the "position of the premises away, of course there is not much "left of the premises. It is a very nice building and it has "very nice pillars. There are very few imposing buildings "in Windsor." Then later he is being asked as to how he arrived at the 3,000*l.* Question: "What was it for?" Answer: "Goodwill." Question: "Goodwill attached to "the whole of your practice?" Answer: "No; the goodwill "I would lose as a result of having to move from a very finely "situated office to some office in a back street, which would "be the position now." Then this question was put to him: "How did you reach the figure of 3,000*l.* on the basis of "increased rentals? It is not for me to point out to anybody "at this hearing to-day or try to point out, if I understand "rightly what the position is with regard to it. I might "be right in suggesting that one of the things to be taken "into consideration in considering goodwill is what is the "increased rental to be obtained as a result of your having "carried on a solicitors' practice at these premises for some "years." Answer: "Yes." Those are, if I may say so again, very frank answers and they amount to this: That in the view of Mr. Hezlett that is the real loss that he is going to suffer. What he apprehends is the loss that would occur, would be loss incurred from leaving these particularly convenient and well-sited premises. That is the very thing which has to be excluded. Also, as I have pointed out, any goodwill which is attributable—and I am quite sure there must be a great deal of it attributable—to the personal skill of Mr. Hezlett and his partners must also be excluded. What is left?

I should have thought myself that those answers make it clear that on that aspect of the matter no possible claim for the existence of what is known as adherent goodwill can be found attached to these premises. But I will return to what I was dealing with before and that is the question as to the existence of any goodwill attributable to the trade or business.

It is pointed out, and rightly pointed out, that on the true construction of the relevant section, which for this purpose is s. 17, sub-s. 1, the holdings to which the Act applies include premises used wholly or partly for carrying on thereat any trade or business. What that appears to me to mean is this: Once you have shown that a trade or business has been carried on on the premises, you are not to have your claim for compensation or a new lease defeated by having it pointed out to you that in addition to the trade or business you are doing something else there. A very common class of case is where you have a shop and dwelling rooms over it. It is not to be said that a man is not entitled to compensation when the lease of his shop comes to an end, merely because the demised premises include the dwelling rooms above it. It is not confined to dwelling rooms. The language, it seems to me, is wide enough to cover the case where, in addition to a trade or business, the tenant carries on a profession. Such cases no doubt occur and, on the assumption on which I am acting, namely, that the non-solicitor activities carried on are properly called a trade or business, this is one of such cases.

The next position which was taken by the judge and which was put forward by Mr. Duveen is one which I cannot accept, It related to what it is possible to include as relevant goodwill. once you get, so to speak, a mixture, partly trade or business and partly a profession. It is possible, it is said, to lump them both together, and once you can find as a result of those combined activities there is a goodwill, then you can give the relief which the Act allows without establishing that there is a goodwill referable to the trade or business, and the trade or business alone.

Then we come to sub-s. 3 (*a*) which I will read again: " For the purposes of this section, premises shall not be " deemed to be premises used for carrying on thereat a trade " or business (*a*) by reason of their being used for the purpose " of carrying on thereat any profession." That seems to me to have a double effect. First of all, if what you are doing is carrying on a profession and nothing else, you cannot use that fact to establish the necessary proposition that you are carrying on a trade or business. I also think it means that you must not use the fact that you are carrying on a profession to assist you in your necessary and vital assertion that you are carrying on a trade or business; and it is to be observed that it is only in respect of the carrying on of a trade or business that relevant goodwill arises. When you look back at s. 4, sub-s. 1, what has to be proved to the satisfaction of the tribunal is that by reason of the carrying on by him of a trade or business goodwill has become attached to the premises. Now I ask myself: How is that to be applied in a case where he is carrying on two activities, one a trade or business and the other a profession? How can he show what the section requires him to show, namely, that by reason of the carrying on of a trade or business goodwill has become attached to the premises, otherwise than by proper evidence on which a court and the judge of fact can, so to speak, dissect his activities and ascertain what adherent goodwill is referable to the trade or business as distinct from adherent goodwill, if any—and I am assuming that such a thing is possible—referable to the profession? It seems to me it flies in the teeth of the very language of s. 4 to introduce into the goodwill which you are looking for, a goodwill attributable to anything but the carrying on of a trade or business.

The proviso to sub-s. 3 appears to me to carry that argument home if it was necessary to rely upon it, but I do not think it is: " Provided that, so far as this Part of this Act relates " to improvements, premises regularly used for carrying on " a profession shall be deemed to be premises used for carrying " on a trade or business." That makes it clear to my mind that, although the carrying on of a profession is excluded from the Act for all relevant purposes, yet it is brought back, so to speak, into the Act by the proviso for the sole purpose of compensation for improvements and it extends to the professional man, whether or not he carries on a trade or business in addition to his profession; that is to say, to any improvements which he makes to the premises. Although he may have premises solely used for carrying on a profession, it would appear that the proviso entitles him to claim compensation for improvements which he makes. If he is carrying on a mixed activity and makes an improvement perhaps solely for the purpose of his profession, he still would be entitled to claim for it. That is what the proviso seems to me to do. But the very fact that it requires to bring in what is referable to the profession for the purpose, and purpose only, of improvements, it appears to add force to the argument that the profession must not be brought in for the purpose of compensation for the loss of goodwill or for the grant of a new lease.

In my opinion, therefore, the county court judge, in basing his judgment on the view that there was an adherent goodwill referable, at any rate, to the solicitors' part of the profession without attempting to discover whether or not there was any adherent goodwill referable to the non-solicitors' part of the business, namely, the insurance, and so forth, misdirected himself in law and his finding cannot stand.

That does not dispose of this appeal by itself. Mr. Duveen says that if he is wrong in his contention, and the judge was wrong in law and did misdirect himself and so came to a finding of fact not relevant to the real question before him, we ought not to ascertain what the true finding of fact was on the right basis of law, but our proper course would be to send the matter back for a new trial with a direction as to the true proposition of law on which the finding of fact should be based. We took the view that that argument would probably be a sound argument if, on an examination of the evidence, there was evidence upon which the judge, if he had directed himself properly and had directed his mind to the question of fact whether there was an adherent goodwill referable to the trade or business alone, could have so found. Then I am disposed to think, and it was not, I think, disputed, that it would be a case for a new trial, because it would raise a question of fact proper to be decided by the county court judge and by no-one else.

On the other hand, we took the view that if the evidence was such that it would not in law have been open to the county court judge on the evidence to have found the existence

C. A.

1949

Stuchbery v. General Accident Fire and Life Assurance Corporation, Ld.

Lord Greene M.R.

of such a limited adherent goodwill, then we ought not to send the matter back because, obviously, if he had properly come to such a conclusion of fact when there was no evidence to support it, then an appeal to this court would have resulted in the setting aside of his judgment. Mr. Duveen ingeniously argued that on a second attempt he might be able to do better in the matter of evidence, but I do not think that that argument ought to prevail. When the case was heard, the applicants, presumably, brought forward their best case and their best evidence. If the evidence which they brought forward would not have supported in law the necessary finding of fact they would have failed, and to accede to Mr. Duveen's argument would be, in effect, to give him two shots, and it seems to me, in deciding whether or not we ought to grant a new trial, we ought to examine the evidence as it was given in the court below and see whether on that evidence it would have been permissible in law for the county court judge to have come to the necessary finding of fact.

We have been through the relevant parts of the evidence and, in my opinion, without taking up too much time about it, they entirely failed to establish any such severable and recognizable goodwill attributable, and attributable alone, to what I am assuming are the trade or business activities as distinct from the professional activities. The activities in question are of four kinds : There is, first of all, what I call the insurance business. That is a very trivial thing. The amount of commission received from it is infinitesimal and it is all received, according to the evidence, possibly with some negligible exception, from clients of the solicitors' business; in other words, it is the usual kind of thing that solicitors are in the habit of doing. Their clients want in connexion with some transaction on some property to effect an insurance and very naturally, at the same time as they are taking their solicitors' advice, they raise the question of insurance and they accept their solicitors' advice as to the kind of insurance they should have and the kind of insurance office they should insure with, and in those cases the solicitors quite rightly obtain a commission from the underwriters. That is the sort of thing that was done in connexion with the insurance business here and to suggest that an activity of that kind will create the necessary adherent goodwill to premises like these is, if I may venture to say so, fantastic. Mr. Duveen after some pressure, and I hope not excessive pressure, was disposed to concede he could not establish any such adherent goodwill based on such an activity. The clerk to the justices has scarcely been mentioned, but I think it is true to say with regard to that, as with regard to all these other non-professional activities, not the slightest attempt in the evidence was made to establish that any goodwill was adherent to the premises by reason of their having been carried on. The reason, I think, is quite obvious. It was impossible to do so in fact, and Mr. Hezlett, who was perfectly entitled to his opinion, no doubt took the view that it was not necessary to do so. I cannot help thinking that if it had been possible to do so, he would have made every effort to do it.

The burden of proving the necessary goodwill is on the applicants and it is not sufficient to talk generally about the goodwill resulting from their activities as a whole. It is necessary, as I have said, on my view of the true construction of the Act, to establish a goodwill referable to the trade or business.

So far as the building society business is concerned, that was principally done in connexion with clients of the solicitors' business. There was a certain amount of it which was introduced by the banks who, when a customer came in and asked for a loan, would there and then say: "This is a building "society business; you had better go and see Messrs. "Stuchbery" who were known not merely as the advertised agents of one particular building society, but generally as doing other forms of building society business. As to the extent and the amount of that business, no attempt is made to show what it was, and it is perhaps pertinent to observe, although I would not regard this as in any way conclusive, although it is not to be passed over in silence, that in their accounts all their earnings are lumped together as professional earnings. Indeed, that is what one would expect in the case of a business of this kind, that they would not attempt to sever the earnings of these collateral activities from their main and real activity of solicitors.

The existence of any kind of what I may call casual business, namely, business coming otherwise than from clients, is negligible and, apart from the small percentage coming from the banks, it appears to me that all their earnings from these activities are really attributable in the main to the solicitors' profession which they carry on.

Quite apart from that, and even assuming that there was a goodwill attached to the non-solicitors' part of their business, it is sufficient for me to say that there was not one particle of evidence on which a judge would be entitled to come to any such conclusion.

Therefore, I say, even assuming the possibility, they have not come within 100 miles of establishing the fact. That, I think, is sufficient to dispose of this appeal. It is obviously an important matter, and I repeat, as I said earlier: I can well understand the anxiety which must be felt by the applicants in respect of the prospective loss of premises which are convenient and suitable for them. In my opinion, the very gallant attempt that they have made to get the benefit of this Act breaks down both on the facts and on the law. The appeal must be allowed.

ASQUITH L.J.: I agree and I cannot usefully add anything.

DENNING L.J.: It is plain that the use of premises for professional purposes is not sufficient to found a claim for compensation or a new lease. The reason is obvious: The goodwill of the partners of a professional firm does not, as a rule, adhere to the premises on which they carry on their practice. It depends on their own personal qualities, on their reputation with their clients, and their name and connexion. It does not depend on their precise address. In a few cases where the situation comes into it—as in the case of a solicitor who has offices opposite a police court—there may be a goodwill attached to the premises, but it is exclusively attributable to the situation of the premises. It was, no doubt, for reasons such as these that the legislature expressly excluded premises used for professional purposes from claims on the ground of goodwill.

Of course, if on part of the premises a professional man carried on a separate trade or business, distinct from his profession, and in respect of which he had built up a separate adherent goodwill, he could claim compensation or a new lease on that account. But nothing of that kind appears here. It was suggested that the firm had a separate trade or business as agents for a building society but, even assuming that they had, there was no evidence that there was any goodwill attaching to the premises on that account. An attempt was made to make up the deficiency by bringing in the goodwill of the solicitors as such, but that is not permissible. The

C. A.
1949
STUCHBERY
v.
GENERAL
ACCIDENT
FIRE AND
LIFE
ASSURANCE
CORPORATION, LD.

only relevant goodwill is the adherent goodwill of the separate trade or business, and there was no evidence of any such goodwill. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker; T. W. Stuchbery & Son, Windsor.*

B. A. B.

Overruled. CHANDRIS *v.* ISBRANDTSEN MOLLER CO. INC. [1950] 2 All E.R. 618.

Overruled. CHANDRIS *v.* ISBRANDTSEN-MOLLER INC. [1951] 1 K. B. 240

1949
May, 2, 3, 12.

Lord Goddard C.J., Birkett and Lynskey JJ.

In re AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY, AND FRANCOIS TAGHER, BARCELONA.

Breach of contract—Contract subject to trade rules—Defence of force majeure.

Arbitration—Breach of contract—Arbitrators' award—Powers of arbitrators to allow interest on awards—Civil Procedure Act, 1833 (3 *&* 4 *Wm.* 4, *c.* 42), *ss.* 28 *and* 29, *Arbitration Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 14), *s.* 11, *Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3.

By a contract in writing dated January 17, 1948, Podar Trading Co. Ld. sold to Francois Tagher, Barcelona, 5,000 bales of cotton equal to type 21 Bilas new crop (i.e., a Broach cotton of 25/32″ staple grown only in India or Pakistan) at 18.25*d.* per lb. net c.i.f. Barcelona, shipment February/March, 1948, subject to steamer and freight available. The contract was expressed to be subject to the rules and regulations of the Liverpool Cotton Association Ld., but neither party was a member of that Association. In the event, no cotton of the type contracted for was grown in the 1948 crop. Alternative proposals were exchanged between sellers and buyer but all cotton available proved to be of a staple of which the export from India had been prohibited by Government of India Orders of November, 1947, and January, 1948. The sellers accordingly notified the buyer by cable on May 18, 1948, that the contract was cancelled by force majeure. The matter was eventually submitted to arbitration by the directors of the Liverpool Cotton Association Ld., who stated a consultative case for the opinion of the court.

The arbitrators asked (inter alia) the following questions: Was the fulfilment of the contract by the sellers rendered impossible by force majeure within the meaning of r. 53? Did force majeure

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

1949

An Arbitration between The Podar Trading Co. Ld., Bombay and Francois Tagher, Barcelona, *In re.*

relieve the sellers from all responsibility under the contract, or did r. 48 apply ? If the seller was not relieved from responsibility, was interest payable by him on the difference (if any) between the contract price up to the date of final award, and the amount payable by the seller under the "invoicing back" clause ? (Under the usual practice of the association such interest was payable, but it was not provided for in the rules.)

Held : (1.) Rule 53 had no application to this case. Rule 48 applied and the plea of force majeure failed. (2.) The Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, did not empower an arbitrator to award interest on damages and further by repealing ss. 28 and 29 of the Civil Procedure Act, 1833, it deprived him of the power which he theretofore possessed of awarding interest under the latter Act. Arbitrators could now give interest only where it was recoverable at common law. Section 11 of the Arbitration Act, 1934, merely provided for the payment of interest on the amount awarded as from the date of the award. An arbitrator's power to award interest was, therefore, now limited to those cases where interest was recoverable at common law.

Case stated by arbitrators.

By a contract in writing dated January 17, 1948, the sellers the Podar Trading Co. Ld., sold to the buyer, Francois Tagher, Barcelona, 5,000 bales of cotton equal to type 21 Bilas new crop at 18.25*d.* per lb. net c.i.f. Barcelona, shipment February/March, 1948. The price was subsequently varied by agreement to 19.7*d.* per lb., to include an increase of export duty. The contract was expressed to be subject to the rules of the Liverpool Cotton Association Ld., a term of which is that such contracts are to be construed to be subject to the laws of England and the jurisdiction of the English High Court. Type 21 Bilas is a Broach cotton of 25/32 of an inch staple. In November, 1947, the Government of India by order prohibited the export of all Indian cotton stapling 13/16 of an inch or better, and required that all cotton intended for export should be submitted to a Government Committee, without whose permission no cotton could be exported. On January 19, 1948, the Government of India by order further prohibited the export of Indian cotton on sales made on or after that date, with the exception of a few varieties of short stapled cotton. After January 17, 1948, there was in the new crop no Broach cotton equal to type 21 Bilas, and there was therefore no exportable Broach cotton which could be tendered in fulfilment of the contract. The shipping documents relating to the last possible shipment of the cotton under the contract would in the proper course have reached Barcelona from Bombay on Monday, April 5, 1948.

On March 20, 1948, the sellers requested the buyer to accept a different type of cotton, but a counter-proposal by the buyer was declined by the sellers. On April 10, 1948, the sellers cabled the buyer in these terms: "Five thousand "bales type Bilas can change type forty-five one hundred "twenty five points less subject Government permission "already applied for." The buyer replied: "Tagher in "Barcelona accepts your proposal shipment type forty-five "one hundred twenty five points less stop Cable probable "date of shipment for opening new credit stop Cable "urgently." On April 13, 1948, the sellers cabled the buyer as follows: "Thanks already applied our Government for "transfer quality will wire you reply during week for alteration "credit on receipt Government permission." On May 18, 1948, the Indian Government refused the required permission, and by a cable of that date the sellers notified the buyer that the contract was cancelled on the grounds of force majeure.

The material parts of the rules of the Liverpool Cotton Association Ld. are as follows:—

Rule 48: "If owing to any circumstances whatsoever, "any such contract has not been or is not to be performed "it shall not be treated as cancelled but shall be closed by "being invoiced back to the seller in accordance with the "Rules in force at the date of the contract."

Rule 53: "Should the seller be able to produce satisfactory "evidence that the timely fulfilment of any contract for the "purchase or sale of cotton was rendered impossible owing "to unforeseen obstruction to traffic, strike, lock-out, riot, "war, quarantine, or force majeure, or should the buyer "be unable to take delivery of the cotton owing to such unfore-"seen contingencies, and should the buyer and seller be unable "to come to a mutual agreement, then the arbitrators shall "take such facts into consideration in making their award."

Rule 227: "In all cases where a contract or part of a contract "is to be closed by being invoiced back to the seller the buyer "shall give written notice to the seller (or if non-resident "in Liverpool the buyer may give such notice telegraphically), "and the invoicing back price, unless agreed upon between "buyer and seller, shall be fixed by arbitration, subject to "appeal . . . . 227 (8). In cases where a contract made "subsequent to June 12, 1947, is to be closed by invoicing "back, the invoicing back price for such purpose shall be "based upon the ascertained exporting value of the cotton "contracted for on the appropriate date in the market "appropriate to the country of origin of such cotton, translated "to the value at the port of destination and subject to any "variation that may have taken place in the costs of freight "and insurance and in the rates of exchange, import and "export duty or tax or any other charges. In so far as the "provisions of this sub-clause are in conflict with any of the "preceding sub-clauses in this Rule the provisions of this "sub-clause shall prevail."

Under the usual practice of the association, any sum payable under the rules in respect of a contract which falls to be closed by being invoiced back, carries interest at 4 per cent. from the date of such invoicing back to the date of final award.

The parties duly referred the dispute to arbitration under r. 227, but being dissatisfied with the umpire's award, appealed to the present arbitrators, who propounded the following questions for the decision of the court :—

"1. Was the fulfilment of the contract of the 17th day of "January, 1948, by the sellers rendered impossible owing "to unforeseen obstruction to traffic and/or force majeure "within the meaning of r. 53 or not ?

"2. Does the unforeseen obstructions to traffic and/or "force majeure referred to above relieve the sellers from "all responsibility in respect of the said contract or not and "does r. 48 of the rules apply or not ?

"3. If r. 48 applies, should the price at which the said "contract should be closed by being invoiced back be (by "reason of the unforeseen obstruction to traffic and/or force "majeure) the contract price namely 18.25*d.* per pound "plus 92 points per pound additional export duty, making a "total price of 19.17*d.* per pound, or not ?

"4. If it is found that the sellers were in breach of the said "contract and are not relieved therefrom by reason of unforeseen obstruction to traffic and/or force majeure, is the "appropriate date for closing the said contract by invoicing "back under r. 48 a date not later than March 31, 1948 ? "If it is found that some later date than March 31, 1948, "is the appropriate date what is the appropriate date ?

"5. If such is the correct date for closing the said contract, "then inasmuch as Broach cotton could not be shipped from

1949

AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY AND FRANCOIS TAGHER, BARCELONA, *In re.*

"India after January 19, 1948, should the price at which the "said contract should be closed by being invoiced back in "accordance with r. 227 (8.) be the spot price of Broach "cotton at Bombay on March 31, 1948, with charges for "insurance and freight to Barcelona and 92 points per pound "additional export duty added, making in all a price of 21.96*d.* "per pound, or not ?

"6. Should the difference which the sellers would be liable "to pay upon the assumptions set forth in question 5 be the "difference between the invoicing back price as mentioned "in question 5 less the contract price 19.17*d.* or not ?

"7. Is interest payable on the difference (if any) between "the contract price and the invoicing back price until the date "of final award, or not ?"

Sir William McNair K.C. and *Robertson Crichton* for the sellers: If there was an implied condition in the contract, as the sellers contend, that there should be in the new crop cotton cloth of Bilas type, and therefore exportable, then the sellers contend that they were protected by the "force "majeure" provision in r. 53 of the rules of the Liverpool Cotton Association Ld. It is submitted that force majeure means, in this case, outside the control of the sellers. The phrase was defined in *Lebeaupin* v. *Richard Crispin & Co.* (1), where McCardie J. quotes the definition which is given in Goirand's French Commercial Law, 2nd ed., p. 854, in the following terms: "This term is used with reference "to all circumstances independent of the will of man, and which "it is not in his power to control, and such force majeure "is sufficient to justify the non-execution of a contract." McCardie J. also approved of the statement of Swinfen Eady L.J. in *Zinc Corporation* v. *Hirsch* (2) that the phrase "force "majeure" was not interchangeable with "vis major" or "the Act of God."

[LORD GODDARD C.J. In r. 53 "force majeure" is used in reference to "the timely fulfilment" of the contract and I should have thought that force majeure in that connexion must be construed as being ejusdem generis with the causes of delay previously mentioned.]

A further point in the case is whether the arbitrators were right in awarding interest on the amount to which they held that the buyers were entitled, the question being whether

(1) [1920] 2 K. B. 714, 719.

(2) [1916] 1 K. B. 541, 554.

since the Law Reform (Miscellaneous Provisions) Act, 1934 (1) they had power to do so. It is true that s. 3 of the Act allows interest to be given when proceedings are tried in any court of record for the recovery of a debt or damages, but it is still open to doubt whether arbitrators have the power to award interest.

Nelson K.C. and *Hodgson* for the buyer. With regard to "force majeure," when it is appreciated what the nature of the contract here was, "force majeure" goes out of the picture. The sellers knew that there was a prohibition against exporting Broach cotton which exceeded 25/32″ staple. There was nothing which was unforeseen in what happened and which prevented the timely fulfilment of the contract. The phrase "force majeure" should be read ejusdem generis with the words that precede it, and the timely fulfilment of the contract was not rendered impossible by any of the causes specified in r. 53. (They referred to *Blackburn Bobbin Co. Ld.* v. *T. W. Allen & Sons Ld.* (2).)

With regard to the question of interest, there have been a number of cases in which interest was allowed by arbitrators, but so far as can be ascertained, no case exists in which it has been said that an arbitrator has no power to grant it. It is submitted that arbitrators still have the right at common law to grant interest and the fact that the Act of 1934 gives power to award interest in cases in which it could not be given before does not deprive an arbitrator of the right he previously possessed. The effect of that Act is not to take away anything but to give something additional. (They referred to Russell on Arbitration, 13th ed., p. 411, para. 3; *Morgan* v. *Mather* (3).)

---

(1) Law Reform (Miscellaneous Provisions) Act, 1934, ch. 41, s. 3, sub-s. 1: "In any proceedings "tried in any court of record for "the recovery of any debt or "damages, the court may, if it "thinks fit, order that there "shall be included in the sum "for which judgment is given "interest at such rate as it thinks "fit on the whole or any part "of the debt or damages for the "whole or any part of the period "between the date when the "cause of action arose and the date "of the judgment: Provided "that nothing in this section "(*a*) shall authorize the giving of "interest upon interest; (*b*) shall "apply in relation to any debt "upon which interest is payable "as of right whether by virtue "of any agreement or otherwise; "(*c*) shall affect the damages "recoverable for the dishonour "of a bill of exchange."

Sub-s. 2: "Sections 28 and 29 "Civil Procedure Act, 1833, shall "cease to have effect."

(2) [1918] 1 K. B. 540.

(3) (1792) 2 Vesey Jun. 15.

Swift v. *Board of Trade* (1) is distinguishable, as that case depended on wording of a particular regulation. The practice in this particular trade is to award interest whenever the invoicing back rule applies. If I establish that there is a custom or usage at Liverpool market, to which the parties have submitted arbitration, that interest should be paid on all awards, then that in my submission is binding upon the parties.

1949

AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY AND FRANCOIS TAGHER, BARCELONA, *In re.*

McNair K.C. in reply. *Swift's* case (1) is quite inconsistent with there being any power in arbitrators to award interest where the court would not. Lord Sumner's opinion indicates that an arbitrator cannot give interest unless either common law allows or (on the facts of that case) the regulation had allowed it. It would be a very wide departure from general rules of law to allow interest on damages when up to 1934 the courts could not give it. The Law Reform Act, 1934, confined such power in express terms to courts of record. There is no room for implication that Parliament intended arbitrators to have the same power. The arbitrators must find either express agreement, or implied agreement, or commercial usage. There is no agreement here, and no finding of usage in the sense of binding commercial custom. To add interest to the award would be inconsistent with the express terms of r. 48.

With regard to force majeure it cannot be said that the word "unforeseen" in r. 53 qualifies the word "war." The qualification is that the seller cannot rely on the rule if his own default prevented fulfilment of the contract.

[LORD GODDARD C.J. The question is whether this rule applies to complete frustration or only to frustration in point of time.]

One must attach reasonable construction to a document. What reason can there be for protecting the seller from partial impediment and leaving him unprotected from total impediment? This case is essentially the same as *Howell* v. *Coupland* (2): both are concerned with a future crop from a particular district. If that crop fails to come into existence then the contract is discharged. Here failure arose through natural circumstances outside the control of the seller, which means force majeure.

Cur. adv. vult.

(1) [1925] A. C. 520.

(2) (1874) L. R. 9 Q. B. 462, (1876) 1 Q. B. D. 258.

1949

An Arbitration between The Podar Trading Co. Ld., Bombay and Francois Tagher, Barcelona, *In re.*

May 12. The judgment of the court was read by Lord Goddard C.J. This is a special case stated by the directors of the Liverpool Cotton Association Ld., acting as an Appeal Tribunal from the decision of an umpire to whom the dispute between the parties was referred. The case is in a somewhat unusual form. The tribunal state that they decided to make an award in alternative form, first in the form of a special case under s. 9, sub-s. 1 (*a*), of the Arbitration Act, 1934, and secondly in the form of a final and conclusive award which they say is to be effective unless either party gives notice within a certain time, as the sellers have done, that they desire to take the opinion of the court on the questions of law raised, and in that event they say that they make their award in the form of a special case. It is quite clear, however, that as stated the case is one of a consultative nature, and not an award in the form of a special case.

The arbitrators ask certain questions of the court, and upon the answers given they will have to make an award in accordance therewith. They have not made any alternative award as is usual where the award is put in the form of a special case. The court treats the matter entirely as a consultative case under s. 9, sub-s. (1) (*a*).

By a contract in writing dated January 17, 1948, the sellers sold to the buyer 5,000 bales of cotton equal to type 21 Bilas new crop at 18.25*d*. per lb. net c.i.f. Barcelona shipment February/March, 1948, subject to steamer and freight available. The price was inclusive of export duty at the rate of Rs. 20 per bale, any difference at the time of shipment to be for the account of the buyer. The contract was subject to the rules and regulations of the Liverpool Cotton Association. The case sets out certain orders of the Government of India made in November, 1947, and on January 19, 1948, under which the export of certain Indian cottons was prohibited. It does not appear to be material to consider those orders for the purposes of deciding whether there was a breach of contract or not, because the Appeal Tribunal has found that there was in fact no cotton at all to be had in India equal to type 21 Bilas of the new season's crop. Cotton of this description is a Broach cotton, that is to say cotton grown in a certain district of India or Pakistan and is of 25/32 of an inch staple, and it appears that none of the Broach cotton of this particular crop was of that staple. It was all of not less than 26/32 and even if the buyers would have accepted

1949

An Arbitration between The Podar Trading Co. Ld., Bombay and Francois Tagher, Barcelona, *In re.*

cotton of that staple, as it was over 25/32 the prohibition against export applied. Consequently there was a failure to deliver and arbitration was claimed.

The first point taken by Sir William McNair on behalf of the sellers was that as no cotton answering the contract description was grown, the case fell exactly within the decision of *Howell* v. *Coupland* (1). In that case the defendant agreed to sell 200 tons of potatoes grown on his land. The crop failed owing to blight so he could only deliver 80 tons. The plaintiff having brought an action for the non-delivery of the other 120 tons it was held that the principle of *Taylor* v. *Caldwell* (2) applied, and as performance was impossible from the perishing of the goods agreed to be sold without his default, the defendant was excused from performance. Now while there is no finding on this point beyond the fact that the crop contained no cotton of 25/32 staple, we will assume that, had there been an action brought at common law for failure to deliver, the sellers would have had a defence, but as the contract in this case was subject to the rules of the Liverpool Cotton Association, we have to look at those rules to see what consequences arise from a failure whether to deliver or take delivery. Rule 48 is the material rule. It provides that "if owing to any "circumstances whatsoever, any such contract has not been "or is not to be performed it shall not be treated as cancelled "but shall be closed by being invoiced back to the seller in "accordance with the rules in force at the date of the "contract."

There have been several cases before the courts with regard to a rule of produce associations in this or similar form, and in spite of the remarkable results which sometimes follow from its application (see for instance, *Adair & Co. Ld.* v. *Birnbaum* (3)), there is no doubt according to the existing authorities that both arbitrators and the courts must give effect to it. The seller having made default, it then became the duty of the Appeal Tribunal to invoice back the cotton to him in accordance with the rules.

[His Lordship read r. 53 and continued :] Sir William McNair contended that the tribunal was bound to take into account the fact that the crop had failed, as he put it, from natural causes, and that that would amount to force majeure which he submitted meant any circumstance beyond the control

---

(1) L. R, 9 Q. B. 462, 1 Q. B. D. 258.

(2) (1863) 3 B. & S. 826.

(3) [1939] 2 K. B. 149.

1949

An Arbitration between The Podar Trading Co. Ld., Bombay and Francois Tagher, Barcelona, *In re.*

of the seller. The expression "force majeure" is not a term of art in English law though the effect of those words in a contract has often had to be considered. But in our opinion r. 53 has no application to the facts of this case even on the assumption that we have made that the doctrine of *Howell* v. *Coupland* (1) would apply. The rule refers to "the timely "fulfilment of any contract" and the word "timely" seems to us to indicate clearly that the rule is dealing with a failure to fulfil a contract within the contract time. This is reinforced by the specific matters mentioned in the rule, obstruction to traffic, strike, lock-out, riot, war and quarantine. All those matters may delay the fulfilment of a contract. Obstruction to traffic or a strike may prevent the shipment or the delivery in due time, and in our opinion the expression "force majeure" must also be construed with regard to the words which precede or succeed it and must, we think, be limited at any rate to something preventing in time the fulfilment of the contract. See on this point *Lebeaupin* v. *Richard Crispin & Co.* (2). It therefore follows that in making their award the arbitrators were not bound to take into account the circumstances which prevented the sellers from obtaining cotton to fulfil the contract.

The next question that arises is whether the amount of the difference which the sellers have to pay to the buyers has been properly calculated. It is not altogether clear to the court on what principle the Appeal Tribunal has acted, but they seem to have fixed the price at which the cotton is to be invoiced back at the spot price prevailing in Bombay on March 31, 1948, and to have deducted therefrom the spot price ruling on January 17, in each case making an allowance for c.i.f. charges and an additional duty of 92 points. The Appeal Tribunal must invoice back the cotton according to the rules. [His Lordship read r. 227 (8.) and continued :] In order to fulfil this rule it is necessary that the cotton should be invoiced back at the export value and not at spot value.

The difficulty which no doubt arises in this case is that, as at the date of the breach there was no exportable cotton, it may be said that there is no exporting value which can be ascertained. But the same is also true of spot value, for if this crop entirely failed there can be no spot cotton of this particular staple. We would also point out that it does not appear to us that exporting value is by any means necessarily

(1) L. R. 9 Q. B. 462, 1 Q. B. D. 258.

(2) [1920] 2 K. B. 714.

the same as spot value. Indeed in many cases it is unlikely to be so. A merchant who knows that he has got to export cotton at a particular date would be unlikely to wait until the last minute and then buy cotton on the spot. It seems more probable that he would make his purchase in advance at the cheapest price at which he can get it, and that price together with his profit would be export value. No doubt the spot price of cotton would include some element of profit and one could well visualize a case in which an exporter had made a forward contract to sell at 18.25*d.* per lb. and had been able to buy it say at 15*d.* per lb. while the spot price of cotton at the time when he had to ship it might be 17*d.* per lb. The difficulties of ascertaining the exporting value in the circumstances of this case are obvious, but as this has to be done in every case where the contract has not been performed owing to any circumstances whatever, we think that the tribunal must arrive at the value on such material as is available to them.

It may be they can do it by ascertaining the value of comparable cotton in previous years, making allowance for the upward or downward trend of the market. It may be that they can obtain figures showing the exporting value of other cotton of this staple but of a different description, and that they will know what allowance should be made for the difference in description. At any rate they must ascertain the value in the best manner that is open to them, but it must be emphasized that it is the exporting value and not the spot value which has to be ascertained. The tribunal have evidently been able to ascertain a spot value which, in the absence of actual cotton, would seem to be a notional value; and therefore it would seem possible for them to ascertain in the same way an exporting value, which is what the rule requires.

It then appears that the tribunal considered the spot value of the cotton at the time of the contract, but that is not the value they must take for the purpose of calculating the difference. They must take the contract price. They are in effect awarding damages, and the damages are the difference between the contract price and the exporting value at the time of the breach, and it is the contract price therefore which is material. Having ascertained, in the way we have indicated, the exporting value for the purpose of invoicing back, they must award the difference between the price at which they invoice back and the contract price. Of course, in ascertaining the price at which the cotton is to be invoiced back, they must add the c.i.f. charges, duty and so forth and to the contract price will also be added the 92 points which would have been added in any case to the sellers' invoice if one had been sent.

The other point which falls for decision is whether the Appeal Tribunal are entitled to award interest on the amount of the difference which they find to be due from the seller to the buyer, and this raises a point of general importance in relation to arbitrations and curiously enough has never fallen for decision since the passing of the Law Reform (Miscellaneous Provisions) Act, 1934. The case tells us that any sum payable under the rules in respect of a contract which falls to be closed by being invoiced back carries interest under the usual practice of the association from the date of such invoicing back to the date of final award, but there is no provision in the rules for the award of interest, and as the parties to this contract are not found to be members of the association, and were in fact not members, they cannot be bound by any practice of the association, but only by the rules. The question, therefore, is whether arbitrators have any power by common law or by statute to award interest.

There is no doubt that prima facie the duty of an arbitrator is to act in accordance with the law of the land. Parties can no doubt agree to accept the decision of an arbitrator on a question of law, or agree that he may do what he thinks fair in any particular case, and if an arbitrator makes an award which is not bad on its face, and no application has been made to him for a special case, or he does not seek the guidance of the court, or put his award in the form of a special case, the court will not review his finding although he may have proceeded on a wrong principle of law. But if he seeks the guidance of the court either by a consultative case or by awarding in the form of a special case the court must see that the rules of law are applied.

Before the Civil Procedure Act, 1833, it is quite clear that a court could award interest only if there was an agreement to that effect, express or implied, as for instance if it were adjudicating on a contract which in terms provided for the payment of interest, or if by mercantile practice the particular transaction upon which it was adjudicating was one which carried interest. A common instance is afforded by bills of exchange which always carried interest, apart from the express

1949

AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY AND FRANCOIS TAGHER, BARCELONA, *In re.*

provision now contained in the Bills of Exchange Act. As Lord Mansfield put it in *Eddowes* v. *Hopkins* (1), "though "by the common law book debts do not of course carry interest, "it may be payable in consequence of the usage of particular "branches of trade or of a special agreement." That case was cited in the well known case of *London, Chatham and Dover Ry.* v. *South Eastern Ry.* (2).

The power to give interest therefore at law was very limited until the Civil Procedure Act, 1833. Under that Act interest could be awarded if a debt or sum certain was payable by virtue of a written instrument at a certain time. Interest by way of damages was also allowed on all other debts or sums certain if a written demand for payment was made upon the debtor giving him notice that interest would be claimed from the date of demand until payment. But interest on damages was only allowed by the statute in a very limited class of actions which we need not set out in detail for they do not include breach of contract. There are to be found in the books certain cases both at law and equity in which in regard to special cases interest was allowed by way of damages but it is by no means clear whether those cases can now be reconciled with the case of *London, Chatham and Dover Ry.* v. *South Eastern Ry.* (2), in which it was held that interest was only payable in three cases, by statute, by agreement or by mercantile custom. Before the Law Reform Act, 1934, there is no case which holds that arbitrators are in any different position to the courts so far as awarding interest is concerned.

The case of *In re Badger* (3) is no exception when it is properly understood. In that case it was held that an arbitrator was not bound by the practice of the Court of Chancery in the method in which he took certain accounts which had been referred to him. In taking accounts in equity interest was not allowed on either side. The arbitrator in *Badger's* case (3) did allow interest on both sides of the account and the court refused to set aside his award because they said he was not bound by a rule of practice but could take the accounts in what he considered to be the fair and proper way.

The case which would seem to be directly in point is *Edwards* v. *G. W. R.* (4). In that case the court approved of the allowance of interest by an arbitrator because it was allowable in the circumstances of that case by the provisions of the Civil

---

(1) (1780) 1 Doug. 376.

(2) [1893] A. C. 429.

(3) (1819) 2 B. & Ald. 691.

(4) (1851) 11 C. B. 588.

1949

AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY AND FRANCOIS TAGHER, BARCELONA, *In re.*

Procedure Act. Accordingly we think we must take it to be the law that before the Act of 1934 an arbitrator had the same powers as the court with regard to the award of interest, but no greater power.

The Law Reform Act was passed on July 25, 1934, and the Arbitration Act, 1934, was already law having been passed on May 17 of that year. The only reference to interest in the latter Act is in s. 11 which provides that "a sum directed "to be paid by an award shall, unless the award otherwise "directs, carry interest as from the date of the award and at "the same rate as a judgment debt." In the Law Reform Act it is provided by s. 3 that "in any proceedings tried "*in any court of record* for the recovery of any debt or damages "the court may if it thinks fit award interest on the whole "or any part of the debt or damages for the whole or any "part of the period between the date when the cause of "action arose and the date of the judgment" and by sub-s. 2 of that section the provisions of the Civil Procedure Act, 1833, which deal with interest, namely ss. 28 and 29, are repealed. So though in the Arbitration Act a provision is made for interest but only on the amount of the award from the date of the award, s. 3 of the later Act gives no power to an arbitrator to give interest either on debt or damages. Moreover as ss. 28 and 29 of the Civil Procedure Act are repealed we feel driven to hold that not only have arbitrators no power to give interest on damages but they have been deprived of the powers which they had so long as the sections of the Civil Procedure Act were in force, and can now only give it in circumstances in which it was recoverable at common law. It may well be that this was overlooked when the Act was passed, but if it was a casus omissus or if the power was taken away per incuriam it must be put right by the legislature. No doubt the Association could amend their rules and provide that interest could be awarded. Then those persons who have made contracts which are subject to the rules and regulations of the Association would be bound by an award which gave interest because as a matter of contract they would have agreed to pay if the award was against them. We feel obliged to hold in this case that there was no power to award interest as there is no provision in the rules for it.

We accordingly answer the questions submitted as follows:—

1. The answer is "No."

2. Rule 48 applies and the sellers are not relieved from all responsibility by reason of r. 53.

1949

AN ARBITRATION BETWEEN THE PODAR TRADING CO. LD., BOMBAY AND FRANCOIS TAGHER, BARCELONA, *In re.*

3. This question does not arise as, though r. 58 applies, r. 53 does not.

4. It is immaterial in view of the other findings of the tribunal whether the date for closing is March 31, or April 5, but it is not later than the latter date.

5. The price at which the contract should be closed is the exporting value to be ascertained as best it can by the tribunal together with the c.i.f. charges and the 92 points additional duty.

6. The difference which the sellers are liable to pay is the difference between the invoicing back price ascertained as already mentioned less the contract price with the 92 points added.

The case will go back to the tribunal with directions to award in accordance with the answers which the court has made to the questions propounded.

The court has considered the question of costs. We recognize that the appellant has succeeded on two points that were stated by the tribunal, but on the main point that was argued, he has failed. We therefore think both parties must pay their own costs.

Judgment accordingly.

Solicitors for the appellants (the sellers): *Simpson, North, Harley & Co.*

Solicitors for the respondent (the buyer): *Layton & Co.*

Applied but Observation of DENNING, L.J., at p. 324, *criticised.* NANCE *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. [1951] 2 All E.R. 448.

Referred to. NANCE *v.* BRITISH COLUMBIA ELECTRIC RLY. CO. LD. [1951] A. C. 601

Applied. HARVEY *v.* ROAD HAULAGE EXECUTIVE [1952] 1 K.B. 120

DAVIES *v.* SWAN MOTOR CO. (SWANSEA) LD. JAMES, THIRD PARTY.

C. A.

1949

Feb. 9, 10, 11, 14, 15.

Bucknill, Evershed and Denning L.JJ.

*Negligence—Contributory negligence does not postulate a duty by plaintiff to defendant—Sole question whether failure to exercise reasonable care was a cause of the injury—*Davies v. Mann *decision, to-day—"Last opportunity" as a test on causation—Law Reform (Contributory Negligence) Act,* 1945, 8 *&* 9 *Geo.* 6, *c.* 28) *s.* 1.

Applied. JONES *v.* LIVOX QUARRIES LD. [1952] 2 Q.B. 608

To establish contributory negligence it is not necessary to show that the negligence of the plaintiff or the deceased person, on behalf of whose estate the plaintiff is suing, constituted a breach of duty towards the defendant; it is sufficient to show that a lack of reasonable care for the plaintiff's or deceased's own safety or property was a cause of the injury. The question is: was the injury the result partly of his own fault? See the

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

judgment of Atkin L.J. in *Ellerman Lines Ld.* v. *H. & G. Grayson Ld.* [1919] 2 K. B., at p. 535, approved [1920] A. C., at pp. 475–7 and the speeches of Lord Atkin and Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* [1940] A. C. 152.

In the course of the argument the court was invited to state whether and to what extent the Law Reform (Contributory Negligence) Act, 1945, had modified or abrogated the rule in *Davies* v. *Mann* (1842) 10 M. & W. 546, and the so-called "last "opportunity" rule. Evershed L.J. expressed the view that these questions did not arise in the case before the court.

As to the effect of *Davies* v. *Mann* (supra) to-day:—

Per Bucknill and Evershed L.JJ. (the latter, as at present advised). The rule applied in *Davies* v. *Mann* (supra) is not affected by the provisions of the Law Reform (Contributory Negligence) Act, 1945.

Per Evershed L.J. The negligence of the plaintiff in that case had ceased to be an operating factor in the collision; at the material time the plaintiff, as a negligent actor, was functus officio, one might say functus culpa.

Per Denning L.J. If *Davies* v. *Mann* (supra) came up for decision to-day it might well be decided in favour of the plaintiff on the ground on which it was in fact decided, namely, that the donkey was lawfully on the highway, c.f. *Searle* v. *Wallbank* [1947] A. C. 341. But if it were not for the special law as to animals, he thought that *Davies* v. *Mann* (supra) might well be decided differently to-day. It would be a case of both to blame. The plaintiff could not get full damages. It would be a case for a reduction in damages because the plaintiff's own fault was one of the causes of the damage.

As to the so-called doctrine of "last opportunity," Bucknill L.J. cited Viscount Simon's speech in *The Boy Andrew* [1948] A. C., at p. 149: "The suggested test of 'last opportunity' seems to "me to be inaptly phrased and likely in some cases to lead to "error, as the Law Revision Committee said in their report "(Cmd. 6032 of 1939, p. 16): 'In truth there is no such rule—the "'question as in all questions of liability for a tortious act is not, "'who had the last opportunity of avoiding the mischief, but "'whose act caused the wrong?'"

Per Evershed L.J. In the last opportunity type of case the original negligent actor has not become functus officio or culpa, but still, it was said, the other party has or had an opportunity of avoiding the collision. Now that, as a doctrine, he ventured to think had suffered a demise independently altogether of the Law Reform (Contributory Negligence) Act, 1945.

Per Denning L.J. The so-called doctrine of "last opportunity" was not a principle of law, but a test of causation. It was a fallacious test, because the efficiency of the causes did not depend on their proximity in point of time. After the decision of the House of Lords in *The Volute* [1922] 1 A. C. 129, and *Swadling* v. *Cooper* [1931] A. C. 1, it fell into disrepute and was superseded by the simple test: what was the cause, or what were the causes of the damage? See the notes to *Davies* v. *Mann* (supra)—2 Smith's Leading Cases (13th ed.), (1929) at pp. 579–589. Since the recent speeches of Viscount Simon in *The Boy Andrew* [1948] A. C. at p. 149, and of Lord du Parcq in *Grant* v. *Sun Shipping Co. Ld.* [1948] A. C., at p. 563, it had no place even as a test of causation. . . . . As a doctrine of law it was dead before the passing of the Law Reform (Contributory Negligence) Act, 1945, though it remained in use by some as a practical test. Since that Act, it was no longer a practical test and should disappear from the books.

Per Denning L.J. The Law Reform (Contributory Negligence) Act, 1945, seemed to contemplate that if the plaintiff's own fault was one of the causes of his injury, his damages were to be reduced by the same amount as against any of the others whose fault was a cause of his injury, whether he sued one or more of them, and they bore the amount so reduced in the appropriate proportions between themselves. Whilst causation was the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, the amount of the reduction was such an amount as might be found by the court to be "just "and equitable" having regard to the plaintiff's "share in the "responsibility" for the damage. That involved a consideration not only of the causative potency of a particular factor, but also of its blameworthiness.

APPEAL from a judgment of Cassels J. at Glamorgan Assizes.

A dust lorry 30 feet long and 7 feet 2 inches wide, was a covered-in vehicle with three shutters which could be pushed up to enable men collecting refuse to empty baskets into the lorry. Steps were provided at the side of the vehicle on which a dustman would ascend to empty his basket. The dustmen were prohibited by their employers, the Swansea Corporation, from standing on the steps, whilst the vehicle was in motion which was described in notices to the men as a very dangerous practice and where it was stated that disciplinary action would be taken against an employee disregarding the instruction. The receptacle for the refuse protruded about 16 inches from the line of the cab making it impossible for the driver to see what was coming up behind him unless he looked in his mirror.

On May 1, 1947, the driver James was driving along a road at about 5 to 8 miles an hour. His mate Muirhead was sitting alongside in the cab. On the off-side, one Turner was standing on the running board, immediately outside the door of the cab. On the first pair of steps aft of the running board stood one Harris and then on the next pair of steps, one Davies. James the driver said that he thought

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

Davies was inside the lorry with the refuse. The shutters were pushed up, so that Harris and Davies were able to hold on to the rail. James passed a double-decker omnibus, 7 feet 6 inches wide, stationary at a bus stop when the driver of the omnibus waved to him to go on and was proposing a little further on to turn across the road into a lane—Alice Lane—going off at a sharp angle on the off-side of the road. At this point, the road was 22 feet 10 inches wide, running down hill, and just at the entry of the lane, the road curved to the right. The road, therefore, in all was only 8 feet 2 inches wider than the combined breadth of the two vehicles. The lorry was nearing the entry to Alice Lane when Davis, the driver of the omnibus who had followed the lorry, started to overtake it. When the lorry was 13 to 20 yards away from the turning into Alice Lane, James put his hand out and shouted to Turner to put his hand out and Turner did so. After that, Harris waved his arms to stop the omnibus. Just at this time Davis made up his mind to overtake the lorry. Davis the driver of the omnibus stated that Davies had signalled to him to come on and he said that in the absence of that signal, he would not have attempted to pass the lorry. Harris denied this and the judge rejected this evidence of Davis. Davis gave no warning with his hooter. He accelerated just as the lorry was turning. The collision occurred almost exactly in the lane entrance, the near-side front wing of the omnibus struck the off-side front wing of the lorry. Very little damage was done to either vehicle. Turner was unhurt but was pushed forward on to the driving mirror of the lorry. Harris's left arm went through a window of the omnibus but Davies who was trying to get over the rail into the lorry was caught by the omnibus in that position, received severe injuries to his pelvis, from which he died four days later.

The widow of Davies, suing as the administratrix of her husband's estate, brought her action against the defendants, the employers of the driver of the omnibus, Davis, and the defendants added James, the driver of the dust lorry, as a third party, claiming indemnity or contribution from him under s. 6 of the Law Reform (Tortfeasors) Act, 1935.

Cassels J. (1.) found negligence on the part of the driver of the omnibus, Davis; (2) and no contributory negligence on the part of the deceased man Davies (presumably on the ground that his negligence did not contribute to his injury). He then found that James, the driver of the lorry was guilty of some negligence: he took a course which would place close-following traffic in a difficulty; he gave warning, but he did not give it soon enough; he did not make proper use of his mirror and was in a hurry, but his Lordship said that Davies, the deceased, was not an invitee on the lorry, but a trespasser. Accordingly, the plaintiff, if she had sued James would have failed in her action, and, that being so, there was no contribution due from James under the Act of 1935. He gave judgment for the plaintiff against the defendants and in favour of the third party against the defendants. He assessed the damages at 2,326*l.* 3*s.*, but since the case might be appealed he apportioned the blame as to two-thirds on Davis the driver of the omnibus and as to one-third on James the driver of the dust lorry.

The defendants appealed.

Beney K.C. and *Gerwyn P. Thomas* for the defendants: James, the driver of the dust lorry, by his driving, was the cause or one of the causes of the injury to Davies and his consequent death. James knew that Davies was a passenger on his lorry and it was his duty to take reasonable care of all passengers whom he knew or ought to have known were on his lorry: his duty of care was not confined to those passengers of whose position in the vehicle he was aware. Once negligence is established against James as causing the injury, it is irrelevant that he did not foresee the actual damage or its extent. He is liable for all the direct consequences of the negligent act. *In re An Arbitration between Polemis and Another and Furniss, Withy and Co. Ld.* (1).

James in his evidence said that he did not know Davies was standing on the steps; he thought that he was inside or on the roof of the lorry. It is submitted that it is immaterial whether James knew or did not know that Davies was on the steps. He was, in Lord Atkin's words in *Donoghue* v. *Stevenson* (2), a person who was so closely and directly affected by James' act that James ought reasonably to have had him in contemplation as being so affected when he was directing his mind to the acts and omissions which are called in question. In *Bourhill* v. *Young* (3) Lord Thankerton speaking of the range of duty of a motor cyclist on the public road towards other

(1) [1921] 3 K. B. 560.
(2) [1932] A. C. 562, 580.
(3) [1943] A. C. 92.

C. A.
1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.

persons on the road said (1): "If then, the test of proximity "or remoteness is to be applied, I am of opinion that such "a test involves that the injury must be within that which the "cyclist ought to have reasonably contemplated as the area of "potential danger which would arise as the result of his "negligence." James knew that Davies was within this area of potential danger. Davies was his passenger and he owed him a duty to take care of his safety, wherever he was on the vehicle. If the passenger, without the knowledge of the driver is in a position on the vehicle where he should not be, that does not absolve the driver from his duty of care. The trial judge speaks about Davies being in the position of a trespasser: that might conceivably be his position as regards the Swansea Corporation, but not as regards the driver James. If on the findings of the trial judge there should have been judgment against the defendants, there should have been judgment for them against James the third party and there should have been an apportionment of the blame and of the damages. The deceased man Davies was guilty of contributory negligence and the damages should be reduced to such an extent as the court thinks just and equitable.

It will be said that Davies was not guilty of contributory negligence because he owed no duty to the omnibus driver not to stand upon the steps of the lorry. But this is fallacious because (*a*) contributory negligence does not depend upon any breach of duty but only upon the question whether ordinary care is exercised, and (*b*) his position upon the step embarrassed or might embarrass the omnibus driver in overtaking.

Glyn-Jones K.C. and *Morris Morgan* for the plaintiff. The trial judge was right in finding that there was not contributory negligence on the part of the deceased. There can be no contributory negligence unless (*a*) the deceased was guilty of negligence and (*b*) his negligence was a contributing cause of his injury. It is submitted (*a*) that it was not negligent for the deceased to stand on a step outside the body of the dustcart any more than it is negligent for a footman to stand on a step outside the back of a carriage. If the deceased was negligent, his negligence was not the cause of his injury, for the driver of the omnibus could plainly see and should have avoided the risk of injuring him. This raises the question whether or

---

(1) [1943] A. C. 92, 98.

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

not the test applied in *Davies* v. *Mann* (1) has been modified or superseded by the Law Reform (Contributory Negligence) Act, 1945 (2).

[DENNING L.J. I am not sure whether the observations in *Davies* v. *Mann* which were the foundation of the " doctrine " of last opportunity " are good law to-day, apart from that question.]

It is submitted that the so-called " doctrine of last opportunity " is not and never was a rule of law: it was and still is a convenient and proper test by which an answer may be found to the question " whose negligence caused the injury ? " Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (3) said: " I find it impossible to divorce any " theory of contributory negligence from the concept of " causation." The test applied by Lord Birkenhead in his speech in *The Volute* (4) is clearly the test of causation.

The passing of the Law Reform (Contributory Negligence) Act, 1945, cannot affect the answer which a court should give to the question, " whose negligence caused the injury ? " For the cause must be the same whether the accident happened before or after the passing of the Act.

[BUCKNILL L.J. In *Yorkshire Dale Steamship Co. Ld.* v. *Minister of War Transport* (5) it was held that the proximate cause of the loss of the ship is not necessarily the one which operates last, but the effective and predominant cause, selected from among co-operative causes.]

That is so, but consideration of the question whether or not one party had a clear opportunity to avoid the negligence of another helps in the search for the effective or predominant cause—or causes—for there may be more than one, and in a true

---

(1) (1842) 10 M. & W. 546.

(2) Law Reform (Contributory Negligence) Act, 1945, s. 1, sub-s. 1: " Where any person " suffers damage as the result " partly of his own fault and " partly of the fault of any other " person or persons, a claim in " respect of that damage shall " not be defeated by reason of " the fault of the person suffering " the damage, but the damages " recoverable in respect thereof " shall be reduced to such " extent as the court thinks just " and equitable having regard " to the claimant's share in the " responsibility for the damage." " Fault " is defined in s. 4 as meaning " negligence, breach of " statutory duty or other act or " omission which gives rise to a " liability in tort or would, apart " from this Act, give rise to " the defence of contributory " negligence."

(3) [1940] A. C. 152, 164.

(4) [1922] 1 A. C. 129.

(5) [1942] A. C. 691.

C. A
1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.

case of contributory negligence there must be at least two. The language of the Law Reform (Contributory Negligence) Act, 1945, resembles that of the Maritime Conventions Act, 1911; and the meaning and intent of the two statutes is the same. The Maritime Conventions Act, 1911, did not abolish the so-called rule of last opportunity in Admiralty (see *Anglo-Newfoundland Development Company Ld.* v. *Pacific Steam Navigation Co.* (1) where the speeches both of Lord Atkinson and Lord Shaw proceed on the basis that the principle in *Davies* v. *Mann* (supra) still applies in Admiralty: see also *The Volute* (2) and many other cases). See also Salmond on The Law of Torts (10th edit.) at p. 457: Winfield on The Law of Tort (4th edit.) at p. 424. The Law Revision Committee is of the same opinion (3) quoted by Lord Simon in *The Boy Andrew* (4). It is submitted that the dissenting judgment of Asquith L.J. in *Henley* v. *Cameron* (5) is correct.

If the Law Reform (Contributory Negligence) Act, 1945, has the meaning which the defendants put upon it, the result is that an injured person who would have recovered his damages in full before the passing of the Act on the ground that the defendant could have avoided the injured person's negligence must now suffer an abatement of his damages; but this is inconsistent with the words of the statute which provide that a claim " shall not be defeated by reason of the fault of " the person suffering the damage," and these words do not contemplate the extension of the statute to the claim of a person who, before the statute was passed, would have succeeded in full.

The man standing on the side of the dustcart may be compared with a man lying in the road. Both could or should have been seen by the driver of the omnibus; and if the omnibus is driven into either, the man standing on the side of the dustcart plays no greater part in causing the collision and his consequent injury than the man lying in the road would have done. Further, if the judgment of MacKinnon L.J. in *Joseph Eva Ld.* v. *Reeves* (6) is right, the driver of the omnibus cannot show that the act of the deceased was negligent unless it constituted a breach of a duty of care owed by the deceased to the driver of the omnibus; and the deceased owed no such duty.

(1) [1924] A. C. 406.

(2) [1922] 1 A. C. 129.

(3) Parliamentary Papers. Cmd. 6032 of 1939, pp. 16 and 17.

(4) [1948] A. C. 140, 149.

(5) (1948) 65 T. L. R. 17.

(6) [1938] 2 K. B. 393, 411.

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

[*British Columbia Electric Railway Co. Ld.* v. *Loach* (1), *Swadling* v. *Cooper* (2), *The Eurymedon* (3), *The Margaret* (4) were also cited.]

H. Edmund Davies K.C. and *Alun T. Davies* for James, the driver of the dust lorry and third party. It is open to the third party to raise in the third-party proceedings any defence which he could have raised against the plaintiff, had he been sued by the plaintiff directly. (Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*).) The deceased man Davies was guilty of negligence which contributed to his injury. There was no finding of fact by the trial judge that he was not guilty of lack of reasonable care. He was negligent in that he was riding on the steps—an action which had repeatedly been prohibited by his employers. A person is guilty of contributory negligence by failing to take reasonable care for his own safety, although he may owe no duty to the defendant. See the judgment of Atkin L.J. in *Ellerman Lines Ld.* v. *H. & G. Grayson Ld.* (5), and the speeches of Lord Atkinson and Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (6) and Charlesworth's Law of Negligence (2nd edit.) (1947) at p. 464.

It has been contended for the plaintiff that the last opportunity rule still applies and that the only effect of the Law Reform (Contributory Negligence) Act, 1945, is to prevent a plaintiff who has been guilty of contributory negligence being barred from all remedy and substituting for that bar a reduction in the damages to be awarded. Since the omnibus was the vehicle coming up behind, it was the omnibus driver who had the last opportunity to avoid the accident.

For the purpose of the present argument, I am prepared to concede that before 1945 the plaintiff would have wholly succeeded because of the doctrine of last opportunity. But by reason of the passing of the Act of 1945 the rule of the last opportunity has gone.

[DENNING L.J. It did not perish by reason of the passing of the Act of 1945; it perished by reason of the decisions at common law.]

My contention is that the doctrine of "last opportunity" (or such vestiges of it as remained) has been abolished by the passing of the Act of 1945. Denning L.J. in his review of

---

(1) [1916] 1 A. C. 719.
(2) [1931] A. C. 1.
(3) [1938] P 41.
(4) (1881) 6 P. D 76.
(5) [1919] 2 K. B. 514, 535.
(6) [1940] A. C. 152.

Winfield's " A Text Book of the Law of Tort," (3rd edit.) in 63 L. Q. Rev. at pp. 517-18 wrote :—

" The doctrine of ' last opportunity ' in relation to contributory negligence is stated fairly enough, but the book went to " press too soon for the effect of the Law Reform (Contributory " Negligence) Act, 1945, to be discussed. The effect in practice " is that the doctrine of ' last opportunity ' has largely disappeared. The Courts are no longer pressed to select, from " various competing causes, what is the cause of the accident. " Where the causes are numerous, as they often are, the Courts " are free to state them, assess their respective influences, and " apportion the damages accordingly. For this reason many " cases in which it could have previously been held that the " defendant was alone to blame are now decided as being " cases where both are to blame."

There is admitted difficulty in construing the definition of " fault " in s. 4 of the Act of 1945, particularly the words, " . . . . which gives rise to a liability in tort." Do they mean, " . . . . which, before this Act, would have given rise to a " liability in tort ? " If so, it is difficult to understand why the additional words were not inserted, especially as qualifying words do appear in the later reference to " contributory " negligence " in the same definition. On the other hand, unless some such additional words are to be read into the definition, i.e., if " liability in tort " means " liability in tort " by virtue of this Act," the definition defines nothing. Were one to continue to apply the " last opportunity " doctrine, no situation could *ever* arise to which s. 1 could apply, for before 1945 there could be no " liability in tort " if at the same time the facts " give rise to the defence of contributory " negligence." Section 1 sets out to eliminate the former artificial rules as to legal causation and demolishes the remnants of the " last opportunity " doctrine. It should be thus interpreted : " Where any person suffers damage as the " result partly of his own fault (which fault before 1945 would " have given rise to the defence of contributory negligence) " *and* partly of the fault of any other person or persons (such " fault being of such a nature that before 1945 it would have " given rise to liability in tort, there being no contributory " negligence in the other party), a claim etc. . . ." Thus interpreted, the Act becomes truly one " to amend the law " relating to contributory negligence " ; interpreted in any other way, it becomes meaningless.

Davies suffered personal injury because he was standing on the dust lorry steps. If he had not been there, he would not have suffered injury. Assuming negligence on the part of the driver of the omnibus and also on the part of the driver of the dust lorry, the Act applies and the plaintiff's damages must be reduced to such extent as the court thinks just and equitable. Finally, it is necessary to consider the trial judge's view that there was no negligence on the part of the driver of the dust lorry inasmuch as there was no breach of any duty he owed to Davies, the deceased man, because Davies, although originally an invitee, had become a trespasser. It is submitted that the trial judge was right in holding that Davies was at the material time and place a trespasser on the dust lorry. The established rules of duty owed to invitees, licensees and trespassers are not confined to persons entering on land. See *Grand Trunk Railway Co. of Canada* v. *Barnett* (1); *Hartwell* v. *Grayson Rollo and Clover Docks Ld. and others* (2); *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.* (3); *Farrugia* v. *Great Western Railway Co.* (4); *Lewys* v. *Burnett and Dunbar and another* (5); and *Howard* v. *Pickfords Ld.* (6).

The duties towards invitees, licensees and trespassers depend on occupation and not on ownership. And James, who was in charge of as well as the driver of the dust lorry, was in occupation of it. *Hartwell* v. *Grayson Rollo and Clover Docks Ld. and others* (7).

[BUCKNILL L.J. If James knew or ought to have known that Davies was riding on the steps, the question of whether he was a trespasser would seem to be irrelevant.]

There was no evidence that James knew of the presence of Davies on these steps at the side of the lorry. He had no reason to think that Davies, in contravention of clear prohibitions, was travelling outside the lorry (*Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.* (3) was also mentioned in this connexion).

Beney K.C. replied.

BUCKNILL L.J. This is an appeal by the Swan Motor Company (Swansea), Ld., from a judgment of Cassels J., delivered on July 13, 1948, awarding the sum of 2,326*l.* 3*s.* to the plaintiff, Mrs. Winifred Davies, in respect of the death

---

(1) [1911] A. C. 361.
(2) [1947] K. B. 901.
(3) [1936] A. C. 65.
(4) [1947] 2 All E. R. 565.
(5) [1945] 2 All E. R. 555.
(6) (1935) 79 Sol. J. 69.
(7) [1947] K. B. 901, 912.

Bucknill L.J.

of her husband, which was caused by the negligence of a driver of a motor-bus in the employment of the defendants, the Swan Motor Company (Swansea), Ld. The accident which resulted in the death of the deceased man occurred on May 1, 1947.

This appeal raises three points. The first is: Was the driver of the omnibus negligent? The second is: Was the deceased man guilty of contributory negligence? The third has arisen in connexion with some third-party proceedings between the defendants, the Swan Motor Company and David Cecil James, the driver of the lorry on which the deceased man was riding. The claim was put forward in those proceedings by the defendants under s. 6 of the Law Reform (Tortfeasors) Act, 1935. The learned judge in the court below directed that judgment be entered against the defendants, and in favour of the third party. The defendants appeal against that part of the judgment.

The third point, therefore, is: Were the defendants entitled to judgment against the third party? That raises the question whether James, if sued by the plaintiff, would have been liable in respect of the same damage as that for which the defendants have been held liable.

The deceased man was a dustman in the employ of the Swansea Corporation, and he was fatally injured in a collision between the lorry on which he was riding and the defendants' motor-bus. The lorry is a large cumbersome vehicle 30 feet long, 7 feet 2 inches broad, and it has on its chassis a receptacle for refuse; it is a covered-in vehicle, but has at the side three shutters which can be pushed up so as to enable the men collecting the refuse to empty their baskets into the lorry. It stands so high from the ground that a man is not able to shoot the contents of his basket into it without standing on some steps, which are provided for that purpose. The three sets of steps with which we are dealing in this case were on the off-side of the lorry. Another peculiar feature about the lorry is that that part of it which is the receptacle for the refuse protrudes about 16 inches from the line of the cab, making it impossible for the driver to see what is coming up behind him unless he looks in his mirror. There are two mirrors, one on each side of the lorry. For some reason, which has not been explained, there was, according to the photograph with which we have been provided, an automatic signalling apparatus on the near side of the lorry, but there was no such apparatus on the off-side.

At the time of the accident James was driving the lorry, and his mate, Muirhead, was sitting by his side in the cab. On the running-board of the lorry, immediately outside the door of the cab, was a man named Turner. On the first pair of steps immediately aft of the running-board was a man named Harris. Then, going towards the rear of the lorry, on the next pair of steps, was the deceased man, Davies. The shutters of the first and second compartments of the lorry were pushed up, so that the men were able to hold on to the rail on the side of the lorry. They had been collecting refuse from a building estate, and at the time in question were moving from there to another set of houses in Alice Lane. The building estate and Alice Lane are both on the west side of the main road. It would be possible to walk in three or four minutes from the building estate to the houses in Alice Lane, but the lorry, in order to get from the one place to the other, had to get out on to the main road, go down the main road in a southerly direction and then turn off to its off-side into Alice Lane. The deceased man, Davies, and Harris elected to ride on the steps of the lorry, instead of walking.

The defendants' omnibus which collided with the lorry was a double-decker omnibus. That also is a large vehicle, 26 feet long and 7 feet 6 inches wide. When the lorry emerged upon the main road from the building estate, the bus was stopped at a bus stop, and was then on the near side of the lorry. The lorry turned away to its off-side, so that both vehicles were then heading in the same direction, and the driver of the bus waved the driver of the lorry to go on and, accordingly, the lorry proceeded down the main road, ahead of the bus, towards Alice Lane. Then the bus started off from the bus stop and started to catch up the lorry. In due course the lorry arrived opposite Alice Lane. At that point the main road is 22 feet 10 inches wide, runs down-hill and bends to the right. The lane itself goes off at a sharp angle from the main road. I mention those facts, because if one adds together the widths of the two vehicles and makes some allowance for the distance that the lorry would be from the near side of the road and the distance the omnibus would be from its off-side of the road when trying to pass the lorry, it shows that there would not be much clearance between the two vehicles. The lorry was proceeding at about 5 to 8 miles an hour, and when near the entrance to Alice Lane the bus started to pass the lorry. The collision between the two vehicles occurred almost exactly in the lane entrance, with the two vehicles heading pretty well in the same direction down the main road. When the collision occurred the near side front wing of the bus struck the off-side front wing of the lorry. The collision in itself was not a serious one, very little damage being done to either vehicle. Harris, the man who was standing on the front steps, was practically unhurt, but his left arm went through the bus window. Turner was unhurt, but he was pushed forward on to the driving mirror of the lorry. But, unfortunately, Davies tried to get into the lorry. The evidence as to what he did is not clear, because the poor man is dead. The only evidence as to it is from Harris, who said: "(Q). The off-side wing hit the near side of the "bus and then they got thrown apart?" "(A). Yes. The "next thing I saw was that Davies, when I shouted, had "apparently tried to get into the vehicle itself, amongst the "rubbish, and he was sort of bent over the top rail of the "lorry, and the bus caught him there. I eased him to the "ground and shouted to our driver, Dai James, to move the "vehicle so that I could pick him up." Davies received very severe injuries to his pelvis and died four days later.

The learned judge only gave one judgment in the main action and the third-party proceedings. I can summarize his conclusions in this way: Firstly, he came to the conclusion that the steps of the lorry, on which the deceased man was standing, were never intended for use by the men when the lorry was in motion. Davies was in a very dangerous position and his presence on the steps of the lorry at the time in question was a breach of the regulations made by the corporation. Secondly, he came to the conclusion that when the lorry was 13 to 20 yards away from the turning into Alice Lane, the driver of the lorry put his hand out, and at the same time he shouted to Turner to put his hand out, and Turner did so. After that Harris waved his arms to stop the bus, but without effect. Just at the time when the driver of the lorry held his hand out, the driver of the bus made up his mind to overtake the lorry. Thirdly, the judge came to a very important finding of fact on the question whether the deceased man, Davies, signalled to the bus to come on. The driver of the bus (a man named Davis) asserted emphatically that he got a signal from Davies to come on, and he said that he would never have attempted to pass the lorry if he had not had that signal. The judge, however, accepted the evidence of Harris on that point. Harris was quite definite that the deceased man never made a signal of the kind spoken to by the driver of the bus. The judge believed Harris and rejected the evidence of the driver of the bus on that point.

On those findings the judge found that there was negligence on the part of the omnibus driver. What he said was this : " He " —(that is the driver of the omnibus)—" gave no warning by " his hooter. In his evidence he said the deceased had " beckoned him on. I am not able to accept that. On he " went, accelerating just as the lorry was turning, in spite of " efforts by Harris waving his arms to stop him, and the result " was a collision in the entrance to the lane, and the deceased, " who tried unsuccessfully to scramble into the lorry amongst " the refuse, was so severely injured that he died in hospital " four days later. I find that there was negligence on the part " of the defendants' driver. He was on a road 22 feet in width, " with a bend in it and, on that bend, without giving any " warning of his approach, he failed to see the signals which " I find James and Turner both gave, and observing, as he " did, that at least one man was on the side of the lorry, he " attempted to pass the lorry, which it was dangerous to do. " I find that there was no contributory negligence on the part " of the deceased man. The case of negligence against the " defendants has been made out." The learned judge therefore found that there was no contributory negligence on the part of the deceased man. That may mean that the learned judge found that there was no negligence in the deceased man or that he found that there was negligence in him, but that it did not contribute to the accident. I think, having regard to what he said about the conduct of the deceased man in standing where he did on the lorry that the judge meant to find that Davies was negligent but that that negligence did not in fact contribute to his injury.

The next finding of the learned judge was that there was some negligence on the part of the driver of the lorry. On that point he said : " I have come to the conclusion that " there was some negligence on the part of the driver " of the dust lorry belonging to the Swansea Corporation. Of course, that does not necessarily conclude the " matter, but I will deal with that point first. He was taking " a course which he should have calculated would place any " close-following traffic in a difficulty. He gave warning " and he caused warning to be given. In my view, he did

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.

Bucknill L.J.

"not give it soon enough. He knew, or he should have known, "that the defendants' bus was following him on a road which "he knew quite well was a bus route. I do not think he made "proper use of his mirror. I think he was in a hurry." That seems to be to be clearly a finding of negligence on the part of the driver of the lorry.

Then the judge dealt with the third-party proceedings against James. It is important to note how the learned judge dealt with that matter. The case was complicated at the time of the trial because there were at first two third parties, one, the Swansea Corporation, and the other James, the lorry driver, and as regards the Swansea Corporation, common employment was a good defence. The learned judge at one time seems to have thought that that was a good answer to the third party proceedings against James, because he said: "The first of "the third parties—in fact, both third parties—raise by way "of defence to this claim against them by the defendants "'common employment.'" The learned judge was in error there, because James did not raise the defence of "common employment." Then the judge dealt with the position of James in this way: ". . . . there was a breach of duty by "the deceased man, who, in defiance of the rules and regulations, and in defiance even of the dictates of common sense, "was riding upon that lorry and clambering on to the iron "steps . . . . and he was there in a position which he must "have known was a very dangerous position." From this the judge drew the inference that the deceased man was not an invitee on the lorry, but was a trespasser, and on that ground he found that the plaintiff, if she had sued James, would have failed and, that being so, that there was no contribution due from James under the Act of 1935, in respect of the damage payable by the defendants.

Were these conclusions of the learned judge right? Going back to the first question: Was the omnibus driver to blame? I think he clearly was to blame, for the reasons given by the learned judge. I think that he put himself out of court by saying that he would not have passed the lorry if he had not had a signal from the lorry driver to do so. If he did not get a signal from the lorry driver to pass he ought not to have passed the lorry. I do not think I need say any more about his position than that.

The more difficult question is: Was the deceased man, Davies, guilty of contributory negligence? Mr. Glyn-Jones, in a very interesting argument, put forward the view that the deceased man owed no duty to the driver of the omnibus, not to stand on the steps of the lorry in the way that he did. Mr. Glyn Jones argued that the deceased was entitled to stand there and, in so doing, was not doing anything wrong vis-à-vis the omnibus driver. I think that the answer to that point is twofold. In the first place, I am prepared to hold that in standing where he did on the lorry the deceased committed a breach of duty to the omnibus driver, because by so doing he made his task in passing the lorry more difficult than it would otherwise have been and, to that extent, increased the risk of a collision. The classic statement on this aspect of the law is the statement of Lord Atkin in *Donoghue* v. *Stevenson* (1), where he said: " The rule that you are to love your neighbour " becomes in law, you must not injure your neighbour; and " the lawyer's question: ' Who is my neighbour? ' receives " a restricted reply. You must take reasonable care to avoid " acts or omissions which you can reasonably foresee would " be likely to injure your neighbour. Who, then, in law, is " my neighbour? The answer seems to be—persons who are " so closely and directly affected by my act that I ought " reasonably to have them in contemplation as being so " affected when I am directing my mind to the acts or " omissions which are called in question." I think in this case that the deceased man ought reasonably to have had the drivers of other vehicles in contemplation, as being affected by the very dangerous and quite unnecessary position which he took up on the lorry. By taking up that position he, to some extent, increased the width of the lorry, thereby making the passageway less broad. It is also one thing for a vehicle to pass another vehicle with wooden or iron sides, and another thing to pass another vehicle with wooden or iron steps attached to its sides and a living human body standing on those steps. The operation of passing is more difficult in the latter circumstances.

The notices which were put in evidence are material on this aspect of the case. The deceased man had been employed by the Swansea Corporation since January, 1945, and these notices were exhibited in places where he could see them. They were put up in all the corporation's depots. The first of those notices is dated July 24, 1939, and reads as follows: " Cleansing Department. Notice. It has been observed

(1) [1932] A. C. 562, 580.

"that carriers are in the habit of riding on the steps of lorries, "which is a very dangerous practice, and could be the cause of "injury to the man himself and to other users of the road." (*This* is a notice which draws attention to the very point I have mentioned, namely, that the deceased's position on the lorry was causing risk of injury to himself and to other users of the road.) "This practice must cease, and drivers must "report any man who persists in doing do." The next notice which was issued is dated December 7, 1942, and reads as follows: "Notice. Riding on steps of motor vehicles. Despite "the previous notice prohibiting employees standing on the "steps of motor vehicles whilst in motion, the practice is still "prevalent, with the result that three accidents have occurred "in the last few months, any one of which could have proved "fatal. This is a very dangerous habit, especially at the "present time when so many air-raid shelters are built in the "centre of streets and free passage of vehicles is somewhat "restricted. In the three accidents referred to above, the "employees of the department were jammed between the walls "of communal shelters and the vehicles. This practice must "cease immediately, and disciplinary action will be taken "against any employee disregarding this instruction. Further-"more, liability under the Workmen's Compensation Acts for "accidents arising from this cause may be repudiated by the "corporation." The next notice which was issued is dated February 13, 1946, and reads as follows: "Riding on steps "of motor vehicles. Despite the fact that notices were posted "in all cleansing department depots on July 24, 1939, and "December 7, 1942, prohibiting employees of the department "riding on the side steps of motor vehicles whilst in motion, "the practice, unfortunately, is still prevalent, with the "result that another accident occurred as recently as "February 1, 1946, which could have resulted in serious, and "perhaps permanent, injury being suffered by the employee. "This practice must cease immediately"—and then attention is drawn to the last paragraph of the notice dated December 7, 1942, which stated that "liability under the Workmen's "Compensation Act for accidents arising from this cause may "be repudiated by the corporation."

In addition to that answer to the point made by Mr. Glyn Jones, there is another answer, viz., that when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1), as follows: "But the "injury may be the result of two causes operating at the same "time, a breach of duty by the defendant and the omission on "the part of the plaintiff to use the ordinary care for the pro- "tection of himself or his property that is used by the ordinary "reasonable man in those circumstances. In that case the "plaintiff cannot recover because the injury is partly caused by "what is imputed to him as his own default. On the other hand, "if the plaintiff were negligent, but his negligence was not a "cause operating to produce the damage there would be no "defence." Mr. Beney also drew our attention to a passage in Dr. Charlesworth's book on the Law of Negligence (2nd ed.) at p. 464, which he adopted as part of his argument. It reads as follows: "The word 'negligence,' however, is not used "in its usual meaning. Negligence ordinarily means breach "of a legal duty to take care, but as used in the expression "'contributory negligence,' it does not mean breach of duty. "It means the failure by a person to use reasonable care for the "safety of himself or his property, so that he becomes 'the "'author of his own wrong.' For example, if a railway train "draws up at a platform which is too short for the train, a "passenger in a carriage which is short of the platform owes "no duty to the railway company not to alight, but if he gets "out without looking where he is going, it is contributory "negligence on his part. A workman on a ship owes no duty "to the shipowner not to fall down an open hatchway negli- "gently left unfenced by the shipowner, but if his fall is due "to his own carelessness, he is guilty of contributory negligence. "A member of the public owes no duty to a railway "company to look out for approaching trains when he "crosses the railway by means of a public level crossing, but "if he omits to do so and is injured, his conduct amounts to "contributory negligence. This difference in the meaning of "'negligence' as applied to a plaintiff and a defendant is "pointed out by Atkin L.J. (*Ellerman Lines, Ld.* v. *H. & G.* "*Grayson Ld.* (2), where he says: 'The doctrine of contributory "'negligence cannot, I think, be based upon a breach of duty "'to the negligent defendant. It is difficult to suppose that a "'person owes a duty to anyone to preserve his own property.

(1) [1940] A. C. 152, 164.

(2) [1919] 2 K. B. 514, 535-6.

C. A.

1949

DAVIES v. SWAN MOTOR CO. (SWANSEA), LD. JAMES, THIRD PARTY.

Bucknill L.J.

" ' He may not recover if he could reasonably have avoided " ' the consequences of the defendant's negligence.' "

Therefore, I think on both grounds, that the deceased man was guilty of negligence.

I come to the most difficult point in the case, namely, the question whether that negligence contributed to the accident. That turns primarily upon the interpretation to be given to s. 1 of the Law Reform (Contributory Negligence) Act, 1945: " (1) Where any person suffers damage as the result partly of his " own fault and partly of the fault of any other person or " persons, a claim in respect of that damage shall not be " defeated by reason of the fault of the person suffering the " damage, but the damages recoverable in respect thereof " shall be reduced to such extent as the court thinks just and " equitable having regard to the claimant's share in the " responsibility for the damage . . . . "

The word " fault " is defined by s. 4: " The following " expressions have the meanings hereby respectively assigned " to them, that is to say . . . . ' fault ' means negligence, " breach of statutory duty or other act or omission which " gives rise to a liability in tort, or would, apart from this " Act, give rise to the defence of contributory negligence." That then is the question which we have to answer— Was the injury to the deceased man the result partly of his own fault? The wording of this sub-section differs from the wording in s. 1, sub-s. 1 of the Maritime Conventions Act, 1911, which deals with the same point in respect of collisions between ships. There may be good reason for that. Here again, speaking for myself, I cannot think that the legislature intended when the Act of 1945 (which is described as " an Act to amend the " law relating to contributory negligence and for purposes " connected therewith ") was passed, to alter the rule, or the law, which had been laid down as to the legal doctrine of causation. I think all that the legislature intended to do was to alter the legal consequences of negligence by both parties causing or contributing to the damage complained of. Until the Act of 1945 was passed, the rule in respect of collisions on land was different from the rule in respect of collisions at sea. The legal doctrine of causation in Admiralty law was not different from the rule at common law—it merely differed in respect of the consequences. That is clear from the speech of Lord Atkinson in *Anglo-Newfoundland Development Co. Ld.* v.

Pacific Steam Navigation Co. (1), where he said: "In Marsden "on Collisions (5th edit., p. 17) it is laid down on the authority "of the cases mentioned in the notes, to some of which I shall "presently refer, 'that there is no difference between the "'rules of law and of Admiralty as to what amounts to "'negligence causing collision; and that, before a vessel "'can be held to be in fault for a collision, negligence causing, "'or contributing to, the collision must be proved,' and "that in the case of a collision a ship though guilty of negligence "will not necessarily be held to blame if the ship with which "she collides could by the exercise of reasonable and ordinary "skill and care have avoided the collision." It is also clear from the judgment of Greer L.J. in *The Eurymedon* (2). That was a case of a collision between two ships. Greer L.J. in his judgment said: "I think the law arising out of what is "usually called the *Davies* v. *Mann* (3) principle may be "stated as follows: If, as I think was the case in *Davies* v. "*Mann* (3), one of the parties in a common law action actually "knows from observation the negligence of the other party, "he is solely responsible if he fails to exercise reasonable care "towards the negligent plaintiff." Evershed L.J., has drawn my attention to a note in the Law Quarterly Review of October, 1938, on the case of *The Eurymedon*, and rule 1, of the five rules which Greer L.J. said arose out of the *Davies* v. *Mann* principle: "If, as I think was the case in *Davies* v. "*Mann* (3), one of the parties in a common law action actually "knows from observation the negligence of the other party, he "is solely responsible if he fails to exercise reasonable care "towards the negligent plaintiff." The note is as follows: "It can therefore be said (and this is the essential point of the "problem) that the plaintiffs' negligence had ceased as soon "as the defendant knew of it and could avoid its consequences "by reasonable care. The plaintiff, it is true, had been "negligent by creating a dangerous situation which might "mislead the defendants, but as soon as the latter became "aware of it, the danger, and therefore the negligence, came "to an end."

In the particular case with which we have to deal, if the lorry had continued to keep on its proper side of the road and the omnibus had run into, or close-shaved, it, and injured the deceased man, I doubt if the negligence of the deceased man would be a cause of, or contribute to, his

---

(1) [1924] A. C. 406, 415.
(2) [1938] P. 41, 49.
(3) 10 M. & W. 546.

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

Bucknill L.J.

injury. But this case is not so simple as that. The deceased man could not get off the steps on which he was standing when the bus was approaching the lorry, and apparently he could not get into the lorry without a great deal of difficulty; and the collision was due to the negligent driving of both vehicles, which resulted in the collision and the injury to the deceased man. That being so, it seems to me that it is impossible to say that the dangerous position of the deceased man on the lorry had ceased to be a factor contributing to the damage that he suffered. It is difficult in a case of this kind to say exactly whether, and if so, when the negligence of the deceased man ceased before the injury complained of. It is clear that there can be two separate causes for a collision. There are two recent cases one has in mind on this point, in both of which there was a difference of judicial opinion. *The Boy Andrew* (1) was a case (not altogether unlike this) in which a ship was overtaking another ship on the starboard side, dangerously close. Whilst one ship was in the process of overtaking the other, the overtaken vessel negligently allowed herself to fall off to starboard, with the result that there was a collision. Each side said that the other was solely to blame, but the House of Lords came to the conclusion that both vessels were to blame—and, on this aspect of the case, Lord Simon said (2): "The suggested test of 'last opportunity' seems "to me inaptly phrased and likely in some cases to lead to "error, as the Law Revision Committee said in their report: "'In truth there is no such rule—the question, as in all "'questions of liability for a tortious act, is not, who had "'the last opportunity of avoiding the mischief, but whose "'act caused the wrong?' In *Davies* v. *Mann* (3) the negli-"gence of the absent donkey-owner, serious as it was, created "a static position, where nothing that he could do when collision "threatened would have avoided the result, whereas the "negligence of the driver of the vehicle continued right up "to the moment when the collision became inevitable. As "by driving more carefully he could have avoided hitting "the donkey, his negligence was the sole cause." The other case is *Henley* v. *Cameron* (4). In that case the defendant had negligently left his motor car unlighted on a highway and a motor-cyclist coming along (with headlights, and, therefore, presumably able to see it) ran into it and was killed. The question was whether the defendant, by leaving his unlighted vehicle on the road was guilty of negligence which contributed to the accident or whether the accident was solely due to the fault of the motor-cyclist, who saw the vehicle and could have avoided running into it. Tucker L.J. and Singleton L.J. held that both parties were to blame and Asquith L.J. held that the motor-cyclist was alone to blame.

---

(1) [1948] A. C. 140.
(2) Ibid. 149.
(3) 10 M. & W. 546.
(4) (1948) 65 T. L. R. 17.

I mention the difficulty of deciding these matters by way of leading up to what was said by the House of Lords in *The Volute* (1). In that case, when dealing with the question of contributory negligence, Viscount Birkenhead said (2): "Upon the whole, I think that the question of contributory "negligence must be dealt with somewhat broadly and upon "common-sense principles as a jury would probably deal "with it. And while, no doubt, where a clear line can be "drawn, the subsequent negligence is the only one to look "to, there are cases in which the two acts come so closely "together and the second act of negligence is so much mixed "up with the state of things brought about by the first act "that the party secondly negligent, while not held free from "blame under the *Bywell Castle* rule, might, on the other "hand, invoke the prior negligence as being part of the cause "of the collision so as to make it a case of contribution." Then, a little later he said (3): "*The Volute* in the ordinary "plain common sense of this business, having contributed "to the accident, it would be right for your Lordships to hold "both vessels to blame for the collision."

I ask myself this question in the ordinary plain common sense of this business: Did the negligence of the deceased man in standing on the steps of the lorry right up to the moment of the collision (or, at any rate, until he tried to climb inside the lorry) contribute to his injury? I think that what he did clearly contributed to his injury. Having come to that conclusion, the only question that one has to decide is: What should be the proportions of blame? In my view, the deceased man was not nearly so much to blame as was the driver of the omnibus, although the deceased man was being carried along by the lorry (and to that limited extent he was identified with the manœuvres of the lorry). I think that the damages awarded to the plaintiff should be reduced by one-fifth.

I come now to the last question to be decided. If the plaintiff had sued James, the lorry driver, on the ground of negligence, would she have succeeded ? I have dealt with the learned judge's findings as to that, and with the greatest respect to him, I think that he has fallen into an error there. It is clear to my mind that James, the driver of the lorry, owed a duty to the plaintiff's husband. He knew that he was a passenger on the lorry. I do not accept the evidence of James given at the trial that he thought the deceased man was inside the lorry : I think that that is contrary to the evidence that he gave before the Coroner. There is no allegation (except in the defence in the third-party proceedings) that James was ignorant of the presence of the deceased man on the steps of the lorry, or that he was a trespasser in standing there : and, indeed, when he was giving his evidence-in-chief he was not asked about the matter. He could have found out where the deceased man was, if he had taken the trouble to do so, but he said that he had no reason to think that he was on the steps. I think that James in breach of his duty to take reasonable care—a duty which every driver of a vehicle owes to a passenger—negligently tried to turn into the lane without giving adequate warning of his intention to do so. On the other hand, I think that the deceased man owed James a duty not to ride on the steps of the lorry, that to do so was negligent, and that that negligence continued up to the time of the injury. I think that they were both to blame—and here again I would divide the proportions of blame four-fifths to James, the driver of the lorry, and one-fifth to the deceased man.

---

(1) [1922] 1 A. C. 129.
(2) Ibid. 144.
(3) Ibid. 145.

All that remains is : How should the sum awarded to the plaintiff, namely, four-fifths of 2,300*l.* odd, be apportioned. The learned judge has apportioned the blame as two-thirds to one-third. Without saying that the Court of Appeal ought not to interfere in an apportionment, unless it is clear that the learned judge has proceeded upon some misunderstanding of the evidence or put a wrong value on certain parts of it, I think that it is undesirable that this court should interfere, except when it is obvious that the learned judge was wrong in regard to the matter. Speaking for myself, I think that I should have arrived at the same conclusion here as did the learned judge. I think I should have put the major blame on the driver of the omnibus and the minor blame on the driver of the lorry. I, therefore, think that the conclusion of the learned judge of two-thirds blame on the omnibus driver and the one-third blame on the lorry driver should stand.

C. A.

1949

Davies v. Swan Motor Co. (Swansea), Ld. James, Third Party.

Evershed L.J. I have reached the same conclusion and, since my Lord has dealt so very fully with all the facts and points which have been raised, I shall give more briefly the reasons which have led me to my conclusion, which I do out of respect for the very full arguments of counsel, and because we are taking in certain respects a view different from that of the learned judge below.

As my Lord has pointed out, there are really three questions which have been presented for our determination: (1.) The question whether the learned judge was justified in the action in holding the motor-bus driver, and therefore, the motor-bus company, liable to the plaintiff for negligence; (2.) In that action can the omnibus company reduce its liability by virtue of the Act of 1945 by showing that the person damaged, namely, the deceased, was so damaged as the result partly of his own fault as defined in that Act; and (3.) In the third party proceedings can the omnibus company call on the driver of the lorry to contribute towards the damages which they, the omnibus company, should pay to the plaintiff, the widow of the deceased man.

Under that third head arises a subsidiary point whether arithmetically the figure, if any, of contribution which the driver of the lorry, James, must provide is affected by considerations as between himself (James) and the deceased, also arising under the first section of the Law Reform (Contributory Negligence) Act, 1945; for it might be that in an action brought by the plaintiff direct against James a different conclusion as to contributory negligence could be reached from that which should be arrived at in an action brought against the omnibus company.

In approaching the answers to those questions it seems to me, first of all, that one must regard the judgment given both in the action and in the third-party proceedings as a single document in the sense, that it is right and proper in considering the language used by the learned judge to read his judgment as a whole. One cannot, as it seems to me, sever the judgment into two mutually exclusive parts, and when considering his conclusion about contributory negligence, shut one's eyes to what the learned judge found later in his judgment as regards the behaviour of the deceased in riding, as he was riding, on the steps of the lorry.

C. A.
1949
DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.
Evershed L.J.

With those preliminary observations I turn to the three questions which are presented to the court for decision. As to the first, the question whether the defendant omnibus company was properly held liable to the plaintiff, I wish to add very little to that which has fallen from my Lord. The point was not, at any rate strenuously, pressed upon us by Mr. Beney, and I content myself by saying that in my judgment there is no ground here which would justify us in coming to any different conclusion from that to which the learned judge came on the question, aye or no, was the omnibus driver negligent.

The second question, as to the contributory negligence if any, of the deceased, is plainly the question which is most difficult of solution, and I confess that my mind has undergone considerable fluctuation in the course of the arguments presented to us on that point. One starts with this difficulty, that the learned judge has found in terms that there was no contributory negligence, and I only arrive at a different conclusion with diffidence because the experienced judge who tried the case must have had well in mind all the facts of the case when he pronounced that particular finding. Nevertheless, as I have indicated, I do with all respect to him, come to the conclusion that the right answer is that suggested by my Lord, namely, that the deceased did suffer damage as the result partly of his own fault, and, expressed arithmetically I hold that the answer to that question should be: "To the extent "of one-fifth."

As my Lord has pointed out, in considering this question the later findings as to the fool-hardy, dangerous, disobedient conduct of the deceased in riding as he did upon the steps of the lorry, is plainly a most vital consideration. I, for my part, was at one time in trouble to formulate or to find any specific duty owed by the deceased to the omnibus driver which might be said to found a case of contributory negligence against the deceased, but I am satisfied now, after considering the authorities to which counsel referred, particularly the speeches of Lord Atkin and Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (1), that it is not necessary for this purpose to found upon some breach of a specific duty owed by the deceased to the driver of the omnibus which was following the lorry on the highway.

In arriving at the conclusion at which I do arrive, what

---

(1) [1940] A. C. 152, 157, 169.

I conceive to be my duty is to look at the whole facts of the case as they emerged both at the trial of the action and on the third-party proceedings, and then, using common sense, to try fairly to apportion the blame between the various participants in the catastrophe, for the damage which the deceased suffered—and it is by that process that I arrive at the conclusion which I have stated.

At one stage of the hearing before us we were invited to consider what learned counsel were pleased to call the absorbing topic, whether, and to what extent, the Law Reform (Contributory Negligence) Act, 1945, had abrogated or modified what has been called the rule in *Davies* v. *Mann* (1), and also (which, in my view, is quite a different thing), the so-called "last opportunity" rule.

I hope that I have absorbed the point and arguments adequately. My conclusion upon that matter is that these interesting points, if they do exist and if they should arise for decision in some case, do not in point of fact arise for decision in the present case. I hope, therefore, that I shall not be regarded as disrespectful to learned counsel and their arguments if I do not refer to all the numerous authorities to which they referred in support of their arguments. But I would just like to say this upon that topic. As I understand the *Davies* v. *Mann* (1) principle, which indeed has already been stated by my Lord, it is this: In that case the plaintiff's negligence or fault consisted in placing the donkey upon the highway; but it having been observed in due time by the defendant, the defendant by colliding with it was treated as the person responsible for the accident, since by the exercise of ordinary care he could perfectly easily have avoided it: in other words, the negligence of the plaintiff had really ceased to be an operating factor in the collision. If I may apply a common phrase, the plaintiff in that case, as a negligent actor, was at the material time, functus officio—one might say functus culpa.

I cannot do better than cite a passage from Lord Shaw's speech in the *Anglo-Newfoundland Development Co. Ld.* v. *The Pacific Steam Navigation Co.* (2) where he said: "The principle "does not apply to shipping law alone, but to all the law "of contributory negligence, from *Davies* v. *Mann* (1) "downwards. And I take the principle to be that, although "there might be—which for the purpose of this point I am

---

(1) 10 M. & W. 546.

(2) [1924] A. C. 406, 419.

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

Evershed L.J.

"reckoning that there was—fault in being in a position which "makes an accident possible, yet, if the position is recognized "by the other prior to operations which result in an accident "occurring, then the author of that accident is the party "who, recognizing the position of the other, fails negligently "to avoid an accident which, with reasonable conduct on "his part, could have been avoided. Unless that principle "be applied it would be always open to a person negligently "and recklessly approaching, and failing to avoid a known "danger, to plead that the reckless encountering of danger "was contributed to by the fact that there was a danger "to be encountered."

As regards the so-called "last opportunity" rule, that, as I have indicated, seems to be something different, if I have apprehended it correctly, from the rule in *Davies* v. *Mann* (1). In the "last opportunity" type of case the original negligent actor has not become functus officio but still, it is said, the other party has or had an opportunity of avoiding the collision. Now that as a doctrine I venture to think has suffered a demise independently altogether of the Act of 1945. I need not refer again to the passage in Lord Simon's opinion in the *Boy Andrew* case (2) which Bucknill L.J. has already cited. No doubt, in practice, such a rule was found useful by judges who were anxious in the interests of justice to avoid coming to a conclusion wholly adverse to a plaintiff merely because, at the material time, the plaintiff was still a negligent actor to some perhaps quite trivial extent. Now the Law Reform (Contributory Negligence) Act, 1945, has rendered it no longer necessary to resort to devices of that kind.

Upon this topic, therefore, though it is unnecessary to express any concluded opinion, I entirely share, as at present advised, the view which my brother has indicated, that such a rule as that which applied in *Davies* v. *Mann* (1) would not be and is not affected by the Act of 1945.

In the present case it is to be observed that the deceased did not merely lie down in the street and remain there still, so that an on-coming vehicle could see him and avoid him with no less difficulty than it could avoid a vehicle drawn up stationary at the side of the road. What he did do, in disregard of prudence and the instructions which he had been

---

(1) [1948] A. C. 140, 149.

(2) 10 M. & W. 546.

C. A.
1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.

Evershed L.J.

given, was that he elected to ride in a position of great danger, from many points of view, upon a moving vehicle. Therefore, his position in relation to other road users must in part at least at any particular point of time depend upon what the driver of his own vehicle did. When all the facts are examined (and anticipating somewhat the answer to the third question) it will be seen that the two drivers (the omnibus driver and the lorry driver) were so incautious in their performances that their two vehicles were involved in a collision. On the facts of the case it seems to me to be quite plain that no doctrine of "last opportunity," if such there is or was, could be applied. One could not fairly say of anybody here that they had a "last opportunity" for avoiding the accident and in fact in the general mélée which resulted, the deceased suffered, and suffered most grievously, partly as the result of the hazardous position which he occupied in relation to the two vehicles.

Looked at in that way, this case seems to me to be different on its facts from such a case as would have arisen if the lorry had proceeded straight along the road, and the omnibus had tried to pass it without there being sufficient room for it so to do. With all respect to the learned judge in the court below, I have therefore come to the conclusion that his finding that there was no contributory negligence within the meaning of the Act of 1945 cannot stand, and that on the facts the fair common-sense view to take of the matter is that which has been proposed by my Lord. I only add this, if I may. I express the hope that there should be and will be no divergence of principle or of the application of principle between the Admiralty Courts and the Common Law Courts, in dealing with these matters of contributory negligence under the Acts of 1911 and 1945 respectively. It seems to me that, broadly regarded, the intention of the two Acts was, in substance, the same, so that similar principles should apply and be applied in the same way.

It only remains for me to add a few words in regard to the third question: Can the omnibus company require the driver of the lorry, James, to contribute to the damage which in the action the omnibus company must pay, namely, four-fifths of the figure awarded by the learned judge? Again, with all respect to the learned judge, I cannot see that the answers which he accepted to that claim are made out. It seems to me that on the facts, particularly the outstanding fact

C. A.

1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

Evershed L.J.

as found that the lorry driver, James, started to turn across the main road without giving any warning signal in time, it is impossible to resist the conclusion that James also caused, in part, the accident by his negligence, and, taking that view, I see no reason to differ from the apportionment of blame which Cassels J. thought appropriate, namely, two-thirds to the omnibus driver and one-third to the lorry driver. As I indicated, there remains under this head the question whether the relationship between James and the deceased was such that if the deceased were suing James, the contributory negligence point would produce arithmetically some different result from that which we have indicated should apply as between the deceased and the omnibus company. I do not think there is any ground for supposing that there is, or ought to be, arithmetically, any difference. The case in a sense is not altogether satisfactory because, being fought on the third-party issue between the omnibus company and James, issues which might have been vital and been fought out and determined between the plaintiff and James did not really arise for decision. Attention has been drawn to the fact, for example, that in the defence to the third-party proceedings the point is not taken that the deceased was a "mere "trespasser" upon the lorry, so that no duty of any kind (as was contended) would be owed to the deceased by the driver of the lorry; and the evidence shows that that point in fact was not thrashed out. One may entertain quite strong suspicions in the circumstances that the driver of the lorry, James, was aware of the suspended position of the deceased man, but I do not think, for my part, it would be right, on the materials supplied to us, to come to any conclusion as to that, and plainly the learned judge did not come to any such conclusion. It seems to me that it is enough to say that by his own admission, James, the driver of the lorry, knew that the deceased man was somewhere on or in the lorry—and that being so it seems impossible to conclude that James owed him no duty. On the other hand, I feel, as my Lord has pointed out, that the deceased's position on the lorry was such as would not deprive the driver of the lorry, James, in an action brought against him of the right of relying upon sub-s. 1 of s. 1 of the Law Reform (Contributory Negligence) Act, 1945.

In the result, arithmetically, it seems to me that the answer is satisfactorily arrived at by reducing in the action the sum

C. A.
1949
DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.
Evershed L.J.

which the plaintiff can recover to four-fifths of the total damage, and then by apportioning that four-fifths of the total damage between the defendant omnibus company and the third parties in the fractions indicated by my Lord, namely, two-thirds and one-third. In those circumstances, it seems to me to be unnecessary to pursue any further questions such as those to some extent argued, e.g., whether the deceased man on the lorry was to be regarded as an invitee of James, and, if so, with what differing results. Those matters seem to me on the facts not to require further discussion.

For these reasons, as well as those stated by my Lord, I have, in this difficult case, reached the conclusion that the answer is that which I have indicated and I would, therefore, allow the appeal to the extent necessary to give that effect.

DENNING L.J. This case raises the important question how far the doctrine of "last opportunity" has survived the Law Reform (Contributory Negligence) Act, 1945. It was well and fully argued before us, but the answer to my mind is that, as a doctrine of law, it was dead before the Act, though it remained in use by some as a practical test. Since the Act, it is no longer a practical test and should disappear from the books. I will give my reasons.

The doctrine of contributory negligence was based on causation. If the plaintiff's negligence was one of the causes of his own damage, he could not recover anything. (See per Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (1).) In order to resolve the question of causation the courts used to apply the so-called doctrine of "last "opportunity." That was not a principle of law, but a test of causation. It was a fallacious test, because the efficiency of causes does not depend on their proximity in point of time; but it held sway for many years because it enabled the courts to mitigate the harshness of the doctrine of contributory negligence. After the decisions of the House of Lords in *The Volute* (2) and *Swadling* v. *Cooper* (3), it fell into disrepute and was superseded by the simple test: What was the cause, or what were the causes, of the damage? (See the notes to *Davies* v. *Mann*—2 Smith's Leading Cases (13th ed.), at pp. 579—589.) Since the recent speeches of Lord Simon in *The Boy Andrew* (4), and of Lord du Parcq

---

(1) [1940] A. C. 152, 164–5.
(2) [1922] 1 A. C. 129.
(3) [1931] A. C. 1.
(4) [1948] A. C. 140, 149.

C. A.
1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.
JAMES,
THIRD
PARTY.

Denning L.J.

in *Grant* v. *Sun Shipping Co. Ld.* (1), it has no place even as a test of causation.

The legal effect of the Act of 1945 is simple enough. If the plaintiff's negligence was one of the causes of his damage, he is no longer defeated altogether. He gets reduced damages. But the practical effect of the Act is wider than its legal effect. Previously, in order to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of competing causes, which was *the* cause—the effective or predominant cause—of the damage and to reject the rest. Now the courts have regard to all the causes and apportion the damages accordingly. This is not a change in the law as to what constitutes contributory negligence. The search in theory was always for all the causes. But it is a change in the practical application of it.

Let me illustrate this by considering how the well-known cases of *Butterfield* v. *Forrester* (2) and *Davies* v. *Mann* (3) would be decided to-day. If *Butterfield* v. *Forrester* (2) came up to-day, it would, I think, probably be decided differently. The plaintiff would not have failed altogether. It would be found that the damage was due to two causes: (1.) the negligence of the defendant in placing the obstruction on the road, and (2.) the negligence of the plaintiff in not keeping a proper lookout. It would, therefore, under the Act of 1945 be a case for contribution. Indeed, many cases have occurred since the Act where the injured plaintiff had the last opportunity of avoiding the damage, but, nevertheless, he recovered reduced damages. I refer particularly to the Factory Act cases, such as *Cakebread* v. *Hopping Brothers* (*Whetstone*) *Ld.* (4) and the unlighted vehicle cases, such as *Henley* v. *Cameron* (5).

If *Davies* v. *Mann* (3) came up to-day, it might well be decided in favour of the plaintiff on the ground on which it was in fact decided, namely, that the donkey was lawfully on the highway, c.f. *Searle* v. *Wallbank* (6). But I propose to put the special law as to animals on one side. Instead of the donkey, I will take the case of a man who negligently leaves his car parked on a dangerous bend in the road, or across a railway line in the docks, and it is negligently run into by an oncoming vehicle. That is a case to which the observations in *Davies* v. *Mann* (3) would apply, if they are valid. Those observations,

---

(1) [1948] A. C. 549, 563.
(2) (1809) 11 East. 60.
(3) (1842) 10 M. & W. 546.
(4) [1947] K. B. 641.
(5) (1948) 65 T. L. R. 17.
(6) [1947] A. C. 341.

C. A.
1949

DAVIES
v.
SWAN
MOTOR CO.
(SWANSEA),
LD.

JAMES,
THIRD
PARTY.

Denning L.J.

which were the foundation of the doctrine of "last opportunity" were re-stated in modern form by Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.* (1) and by Greer L.J. in *The Eurymedon* (2) and come to this: If the defendant actually saw that a dangerous state of affairs had been created by the negligence of the plaintiff, and the defendant, thereafter, by the exercise of reasonable care could have avoided doing any damage, then he is solely liable if he failed to exercise that care. I desire to say that, in my opinion, that is not a proposition of law, but only a test of causation. And it is a test which may sometimes lead to error. As a proposition of law, it can only be supported by saying that negligence in creating a dangerous obstruction ceases as soon as the driver of the oncoming vehicle sees it. I cannot accept that view. The plaintiff's negligence in leaving the obstruction there is a continuous negligence, which continues after the oncoming driver sees it. But the fact that he does see it may mean in some cases that the obstruction is not the cause of the accident. For instance in the case I have put it is, of course, plain that if the defendant actually saw the parked vehicle in good time and purposely ran into it—or, indeed, what comes to the same thing, if he, seeing its position, drove recklessly on that account, careless whether he hit it or not—his conduct would be so powerful a factor in producing the damage that the presence of the parked vehicle would not be itself a cause of the damage. The sole cause could be the purposeful or reckless act of the defendant. The parked vehicle would be only the circumstances in which, or on which, the cause operated. That is the kind of illustration taken by Lord Ellenborough, Baron Parke and Lord Shaw. But if the defendant did not do it purposely or recklessly the position is very different. If the oncoming driver was merely negligent, as in *Davies* v. *Mann* (3), the presence of the parked vehicle may very well be one of the causes of the accident. In most of these cases no valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it. If the driver of the oncoming vehicle was negligent, for instance, in not keeping a proper lookout so that he did not actually see the parked vehicle in time to pull up, or in driving too fast, so that, although he actually saw it before the accident, he could not

(1) [1924] A. C. 406, 419–20.
(2) [1938] P. 41, 49–50.
(3) 10 M. & W. 546.

pull up, or in not applying his brakes soon enough—then there are two causes of the accident : (1.) the negligence of the owner of the parked car in letting it be an obstruction on the road ; and (2.) the negligence of the driver of the oncoming vehicle in driving too fast and not keeping a proper lookout, or not applying his brakes soon enough. Both are at fault, and if both vehicles are damaged, then, under the Act of 1945, whichever is plaintiff or defendant, on claim or counterclaim, the damages are apportioned. That this is the correct approach can be seen by supposing that, instead of a parked car, there was a slow-moving wagon on the bend crossing the railway line. If it was going on its wrong side of the road, or crossing the line without any proper lookout, the fault of the driver of the wagon would be one of the causes of the accident : but if it was going on its proper side and with a proper lookout he would not be in fault and his conduct would not be a cause of the accident, because the law on this subject is only concerned with causes due to someone's "fault." In the result, therefore, if it were not for the special law as to animals, I think that *Davies* v. *Mann* (1) might well be decided differently to-day. It would be a case of both to blame. The plaintiff could not get full damages. It would be a case for a reduction in damages, because the plaintiff's own fault was one of the causes of the damage. I venture to think that if the doctrine of "lost opportunity" is discredited, so is the rule in *Davies* v. *Mann* (1), for, as I have always understood it, they are one and the same doctrine.

Another test of contributory negligence, as fallacious as that of "last opportunity," is the test of duty. It has sometimes been suggested that an injured plaintiff is not guilty of contributory negligence unless he was under a duty of care towards the defendant. Mr. Glyn-Jones, with characteristic frankness, did not himself contend that this was a correct approach, but drew our attention to *Joseph Eva Ld.* v. *Reeves* (2) which was said to support the proposition. In my opinion, it is not a correct approach. When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence. The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a reasonable man and with reasonable care. (See *Ellerman Lines Ld.* v. *H. & G. Grayson Ld.*—per Lord Atkin (1)—approved in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*, per Lord Atkin (2).)

---

(1) 10 M. & W. 546.

(2) [1938] 2 K. B. 393.

The correctness of these views as to contributory negligence, and indeed the necessity for them, is shown by considering how inapposite the test of "last opportunity"—or the test of duty—is in cases where the damage is due to the faults of three persons. Take the present case. The omnibus driver, it is said, actually saw the deceased man standing on the steps of the dustcart and thus had the last opportunity of avoiding the accident; furthermore, the deceased man owed no duty to him; therefore, the deceased man was not guilty of contributory negligence vis-à-vis the omnibus driver. But the dust lorry driver, it is said, did not actually know that the deceased man was on the steps, and thus had not the last opportunity of avoiding the accident; furthermore, the deceased man did owe a duty to the dust lorry driver not to stand on the steps; therefore, the deceased man was guilty of contributory negligence vis-à-vis the dust lorry driver. That would be equivalent to saying that the fault of the deceased man was not a cause of the accident vis-à-vis the bus driver, but was a cause of the accident vis-à-vis the dust lorry driver—which is absurd. If it is a cause of the accident, it is a cause vis-à-vis all concerned.

This point is made plain by seeing what would happen if the plaintiff brought an action against the drivers of both vehicles. If they were both found guilty of "fault" which caused the damage, could it possibly be said that the plaintiff's damages were to be reduced as against one and not as against the other? And even if that were possible, what would be the proportions as between the two drivers? Would contributions be assessed on the higher or lower figure of damages? If the 1945 Act were to involve such questions, it would introduce many complications into the law. The Act seems to contemplate that, if the plaintiff's own fault was one of the causes of the accident, his damages are to be reduced by the self-same amount as against any of the others whose fault was a cause of the accident, whether he sues one or more of them, and they bear the amount so reduced in the appropriate proportions as between themselves. (See s. 1, sub-ss. 1, 3, 4 and 6 of the Act.)

(1) [1919] 2 K. B. 514, 535. (2) [1940] A. C. 152, 164.

Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. The fact of standing on the steps of the dustcart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different.

✓ Speaking generally, therefore, the questions in road accidents are simply these: What faults were there which caused the damage? What are the proportions in which the damages should be apportioned having regard to the respective responsibilities of those in fault?

In the present case, therefore, the first question is: What were the faults which caused the damage? The collision between the two vehicles was caused by the negligence of the two drivers: the omnibus driver because he attempted to overtake in a narrow lane, on a bend, without warning and before receiving a signal: the dust lorry driver because he turned suddenly across the road without making proper use of his mirror and without giving sufficient warning of his intention to do so. But although those negligent acts were the cause of the collision, what was the cause of the damage to the deceased man? He was, as the judge found, in a position which he must have known was a very dangerous position, in defiance of the dictates of common sense. If he had not been in that position, he would not have been injured. His position was certainly one of the causes of the damage, just as in *The Margaret* (1) the improper position of the anchor was one of the causes of the damage to the barge. It would, therefore, appear that the damage was caused by the faults of all three. But Mr. Edmund Davies took a special point on behalf of the dust lorry driver. He contended that that driver should be exempt from any liability to contribution. He said that the deceased man was a trespasser on the step of the lorry, and, therefore, if the driver of the dust lorry had

---

(1) (1881) 6 P. D. 76.

C. A.
1949

DAVIES v. SWAN MOTOR CO. (SWANSEA), LD. JAMES, THIRD PARTY.

Denning L.J.

been sued, he would not have been liable: that is, he would not be guilty of any "fault." Mr. Davies argued that the distinctions about invitees, licensees and trespassers were as applicable to vehicles as to land. I do not agree. It would, I think, be unfortunate if these refinements and distinctions were introduced into road accidents. I regard the deceased man not as a trespasser but as a servant acting negligently, and, indeed, disobediently, in the course of his employment. Although the dust lorry driver did not actually know that he was on the step, he might have foreseen it. He would, therefore, have been liable, if sued, and was guilty of a "fault." It is a case, therefore, where the damage was caused by the faults of all three of them.

The only remaining question is: In what proportions should the damage be borne? I think that the deceased man was very considerably to blame, but I am not prepared to differ from the figure of one-fifth suggested by my Lord. The damages should, therefore, be reduced by that figure. They should then be borne by the bus company and the dust lorry driver in the proportion of two to one assessed by the trial judge.

Solicitors for the defendants: *Clifford-Turner & Co. for Dahne and Thomas, Swansea.*

Solicitors for the plaintiff: *Pattinson and Brewer for Andrew, Thompson and Partners, Swansea.*

Solicitors for the third party: *Kenneth Brown, Baker, Baker for T. B. Bowen, Swansea.*

C. G. M.

J. DENNIS & CO. LD. *v.* MUNN.

C. A.
1949
Feb. 23.

Bucknill, Evershed and Denning L.JJ.

Emergency legislation—Building—Control—Licence for specified work within a permitted figure—If work exceeded beyond permitted figure, free allowance cannot be added to justify amount of work done—Free allowance only permitted for severable work—Defence Regulations, 1939, *No.* 56A—*Control of Building Operations* (*No.* 8) *Order,* 1947 (*S.R. & O.* 1947, *No.* 74).

The allowance of building work permitted without a written licence by virtue of the Control of Building Operations (No. 8) Order, 1947 (viz., 10*l.*, plus 2*l.* a month for the period February 1 to July 31, 1947), was only permitted for work severable from specified work for which a written licence had been obtained—work ordered separately and executed separately. Accordingly, where a builder knowing that there was a written licence, but not the amount of it, had contracted to do work which exceeded in amount that provided for in the written licence, and carried out his contract, he could not recover from his employer the cost of the additional work. He was not allowed to add, to the cost specified in the written licence the amount allowed under the order for work done without a written licence.

Judgment of Scott L.J. in *Jackson Stansfield & Sons* v. *Butterworth* [1948] 2 All E. R. 558 followed.

APPEAL from the Marylebone county court.

Mrs. McGarvie Munn, the defendant, in April, 1947, was desirous of having the front of the house that she occupied at 45, Beaufort Gardens, Knightsbridge, London, painted. She consulted a director of the plaintiff building company who asked her if she had a licence. The defendant said that she had not, but that she would apply for one, when she had received an estimate from the plaintiff company. The director first quoted 95*l.* and then 65*l.* for painting only stonework. The plaintiff said she could get the company more work, if they reduced the price. On April 18, 1947, the plaintiff company gave the defendant a written schedule of work and quoted a price: "To washing down all painted "stonework on front elevation and painting with two coats "of oil paint all stonework previously painted except area; "area, excluding retaining wall, up to ground floor to be "painted with best quality oil bound distemper; area railing "to be painted in light green; for the sum of 50*l.*" On May 8, 1947, the defendant telephoned to the director to say that she had the licence quoting its reference number.

The director by telephone ascertained from the authority that the defendant in fact had obtained a licence and without going to examine it, and in ignorance of the amount for which it was granted, proceeded with the work, which was done during two months.

The defendant had obtained an estimate from another firm on April 18, 1947, to do a large amount of sanitary work, mainly laying drains and putting in pipes at a price of 294*l.* and in addition for external painting front elevation, "basement to first balcony . . . . Wash and clean down the whole "of the paintwork to walls, doors, windows, balcony railings "and area railings, scale off all loose paintwork and prepare "and paint the whole one coat 34*l.* 15*s.* 0*d*," making a total

C. A.
1949

J. DENNIS
& CO. LD.
v.
MUNN.

of 328*l.* 15*s.* 0*d.* The licence granted by the Ministry was for that amount and extended only as regards painting the front of the house to one coat on the front of the house—up to the first balcony.

The plaintiff company sent their bill for 50*l.* to the defendant who stated that she did not consider the work had been satisfactorily done and paid 30*l.* only. The company sued her for the balance.

His Honour Judge Konstam, found that the plaintiff company had done the work in accordance with their contract. For the company it was contended that under the Control of Building Operations (No. 8) Order, 1947 (1), the defendant

(1) By Defence Regulation 56A (dealing with the control of building operations) "(1.) Subject "to the provisions of this regu"lation the execution in the "United Kingdom for any purpose "specified in the first column "of the table set out in Part I "of the sixth schedule to these "regulations of any operation "specified in Part II. of that "schedule begun after the sixth "day of October, 1940, shall be "unlawful except in so far as "it is authorized by the authority "specified in the second column "of the said table: Provided "that . . . ."

By sub-reg. (2.) "Subject to "the provisions of this regulation, "the carrying out in the United "Kingdom, except for a purpose "specified in the first column "of the table set out in Part I "of the sixth schedule to these "regulations of any work specified "in Part III of that schedule "or of any maintenance work "on a building or on any such "works as are mentioned in "Part II of that schedule shall "be unlawful except in so far "as there is in force in respect "thereof a licence granted by "the Minister: Provided that "the Minister may by order "authorize the carrying out of "such work without a licence "within such limits of cost as "may be specified in the order, "and may prescribe different "limits of cost for different classes "of work or for different classes "of property or for different "areas, and any such order may "without prejudice to the gener"ality of this provision, limit "the cost of the work, or of the "work of any class, that may "be carried out in any period "specified in the order on any "single property as defined in "the order."

By the Control of Building Operations (No. 8) Order, 1947 (S. R. & O. 1947, No. 74) para. 2 (1.): "Any person may, "without a licence from the "Minister of Works under para. 2 "of the said reg. 56A, carry out "on any single property during "any month in the period be"ginning with February 1, 1947, "and ending with July 31, 1947, "any work to which this article "applies, if the cost of the work, "together with the cost of any "other such work previously "carried out on that property "during that month without such "a licence as aforesaid, does not "exceed the sum of 2*l.* (2.) In "addition to the work authorized "by the foregoing paragraph was entitled to spend 10*l.* plus 4*l.* (for two months), in all 14*l.*, in addition to the 34*l.* 15*s.* 0*d.* for which the licence had been obtained. His Honour ruled against the company on this point and gave judgment for the company for 4*l.* 15*s.* 0*d.* The company appealed.

H. G. Garland for the plaintiff company. The work which was licensed by a written licence was from the basement to the first balcony of No. 45, Beaufort Gardens. That work has been done under the written licence and has now been paid for. The building company have carried out further work which was not included in the written licence and to which the written licence has no application—the painting of the stonework on the front of the house from the balcony upwards. For this work the written licence was not given. There is no reason why the free general allowance, which can be done without licence, 10*l.* and in this case 4*l.* in addition—14*l.* in all—should not be spent on the painting of the front of the house above the balcony. It could be spent on painting the back of the house and there is no reason why it should not be spent on the front of the house. There is nothing in the order of 1947 which provides that work done under the free general allowance shall not be of the same nature as that done under a written licence or that it shall not adjoin that done with a written licence. The sole point is that the work claimed for is not that for which a written licence has been obtained. If, therefore, it comes within the description of work allowed under the order of 1947, as it does—it is the subject of the free general allowance.

[Jenkins J. The contract between the company and the defendant was for one job of work to paint the stonework on the front of the house.]

Yes: but the company were entitled to break up the contract and perform part of it under written licence and the other part under the general free allowance.

[The judgment of Somervell L.J. in *Bostel Bros. Ld.* v.

" of this article, any person may, " without such a licence as aforesaid, carry out on any single " property, during the said period, " any work to which this article " applies, if the cost of the work, " together with the cost of any " other such work previously " carried out on that property " during that period without such " a licence as aforesaid (not being " work authorized by the foregoing " paragraph) does not exceed the " sum of 10*l.*"

Hurlock (1) and of Scott L.J. in *Jackson Stansfield & Sons* v. *Butterworth* (2) were mentioned.]

The defendant appeared in person.

BUCKNILL L.J. The whole question in this case turns on the interpretation to be given to Defence Regulation No. 56A.

[His Lordship read the regulation and continued :]

The argument put forward here on behalf of the plaintiff company is that this work which was done was work which might properly have been done without a licence within the limits of the Control of Building Operations (No. 8) Order, 1947. [His Lordship read the order and continued :]

The conclusion to which I have come is that the trial judge was right when he said that, in his view, the liberty to spend 10*l.* plus 2*l.* a month given by the Control of Building Operations (No. 8) Order, 1947, cannot be prayed in aid to increase the amount licensed to be spent on a particular work. In my view, the proviso was intended to apply to small items of work of the kind specified in the order which did not cost more than 10*l.* or 2*l.* in any one month and was not intended to add indirectly to the amount of any particular licence to do a particular work. In this case there was a contract to do a particular work, namely, to paint the stonework on the front of this house. That was illegal except in so far as it was covered by the licence which was only to paint up to the first balcony for the sum of 34*l.* 15*s.* 0*d.* That being so, it was illegal, as I have said, to extend the work beyond that permitted by the licence. I cannot think myself that the proviso was intended to give a kind of franchise to any licensee with a written licence and to entitle the person doing the work under a single contract such as this to exceed the licence to the amount of 10*l.* plus 2*l.* in every month. For these reasons, I think the learned judge was right and that the appeal must be dismissed.

DENNING L.J. I agree. Builders who undertake work nowadays do so at their risk, unless there is a licence to cover it. The risk is not only that they will be subject to penalties, but also that they will have no right to recover payment for their work. It is, therefore, incumbent on them, before

---

(1) [1948] 2 All E. R. 312, 316. (2) [1948] 2 All E. R. 558.

C. A.

1949

J. Dennis & Co. Ld. *v.* Munn.

Denning L.J.

they undertake any work, to see that there is a licence covering their undertaking. If it is work which will cost more than the free amount allowed by the relevant Building Operations Order—which was at the material time 10*l.* and 2*l.* a month—they must see that there is a written licence. They must not simply take the owner's word that there is a licence. They should ask to see it. If they do not do so, and it turns out that he has no licence at all, they have acted illegally and can recover nothing. They cannot recover even the amount permitted by the free licence, because they did not act under it and could not act under it. The work done here was more extensive than that permitted by the licence. Of course, if the employer knowingly deceives them, they may have an action for fraud on that account; but nothing of that kind can be suggested here.

In this case the builders did not take any of the precautions which, for their own protection, they should have taken. They took the employer's word that there was a licence. They telephoned the local authority and verified that fact, but they never asked to see it. If they had, it would have been apparent that the licence did not cover the work for which they had estimated. They undertook to paint the whole of the stonework on the outside of the house, at a cost of 50*l.*, whereas the licence was only to paint up to the balcony for 34*l.* 15*s.* 0*d.* In so far as the work was covered by the licence for 34*l.* 15*s.* 0*d.*, they have recovered payment or judgment, but the excess of 15*l.* 5*s.* 0*d.* was not covered by any licence at all and was unlawful. If this excessive work had been done intentionally, there could be no question whatever that they could not recover anything. The fact that it was done unintentionally does not put them in any better position.

In that plight, the builders claim to rely on the fact that the employer had a free allowance, that is, a general licence to do 10*l.* worth of work and 2*l.* in every month and, as this work took two months, they claim 10*l.* plus 4*l.*, making 14*l.* The answer to that contention seems to me to be this: The general licence is only available in respect of severable work, ordered separately and executed separately. When there is one indivisible work in hand, covering more than the free allowance, then a specific written licence must be obtained. It is not permissible to increase the amount contained in the specific licence by adding on to it the free allowance.

C. A.

1949

J. Dennis & Co. Ld.
v.
Munn.

Denning L.J.

The conditions of these written licences expressly say that the specified amount shall not be exceeded. If the builders' contention were to prevail, it would be an indirect way of exceeding the amount.

This case shows that builders should always get the position clear before they start the work ; see what the written licence is, then see what the free allowance is, and, if the work comes under both heads, they should sever the work so as to make it clear that all is lawful. It was unlawful for the painting of the stonework on the front of that house to be done or for payment to be enforced except to the amount permitted by the written specific licence. I agree that the appeal should be dismissed.

Jenkins J. I also agree that this appeal fails. The question which it raises was, I think, really concluded in a sense adverse to the builders by the decision of the majority of this court in *Jackson Stansfield & Sons* v. *Butterworth* (1), to which we were referred in the course of the argument. In that case what happened was that a builder was engaged to do some work for a garage proprietor, consisting of alterations or repairs to his garages. The estimated cost of the work was 35*l.* He duly obtained a licence in writing for that amount. As the work proceeded, he found that more than 35*l.* worth of work was going to be done, and he obtained from the appropriate representative of the local authority an oral licence to go on and complete the work, provided the total cost did not exceed 100*l.* On the faith of that oral assurance, he completed the work at the cost of 69*l.* 18*s.* 2*d.* and the question in issue was whether the absence of a written licence as regards the excess over 35*l.* made the contract illegal either as regards the whole amount or at all events quoad the excess over 35*l.* It was, however, conceded in the course of argument in this court that the contract should be considered as legal up to the licence amount of 35*l.* It was contended on behalf of the builder that if he failed in his claim to recover the full amount of the excess over 35*l.* on the strength of the oral licence, he was at all events entitled not only to recover the 35*l.*, but to add to that sum the free amount of 10*l.* which was allowed at that time under the Control of Building Operations (No. 6) Order, 1946 (the precursor of Control of Building Operations (No. 8) Order,

---

(1) [1948] 2 All E. R. 558.

C. A.

1949

J. Dennis & Co. Ld. v. Munn.

Jenkins J.

1947, which is the relevant order in this case), and also to add one of the monthly sums of 2*l.* which the order of 1946 also allowed. That contention was rejected by the majority of the court, who held that the absence of writing was a fatal objection and that the builder could only recover the 35*l.*, without the additional 12*l.*

Scott L.J. dealt with the matter of the 12*l.* in these terms (1): "On January 16, 1946, the Minister of Works, in exercise "of his sub-delegated powers to legislate by order conferred "by reg. 56A, para 2., made the Control of Building Operations "(No. 6) Order, 1946 (S.R. & O. 1946, No. 86), which permitted "such work to be carried out without a licence during the "period running from February 1 to July 31, 1946, up to "2*l.* per month, and, in addition, allowed unlicensed work "up to a further 10*l.* The whole of the work"—that is the work in the case then before the court—"was carried out "in a fortnight, it being finished by July 11, 1946. The "limit for unlicensed work was, therefore, 12*l.*, but there is "no provision, either in that order or in the regulation, which "authorized the addition of any amount for such unlicensed "work to the licensed limit. I read the regulation and "order together as meaning that, when the figure for work "proposed exceeds the limit allowed by the order, the whole "has to be licensed. That order, therefore, has no relevance." It seems to me that that passage in the judgment of Scott L.J. (which, for the reasons I have explained, was necessary to the decision) substantially answers adversely to the building company in this case the very question raised in this appeal. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff company: *Masons.*

C. G. M.

HELMAN *v.* HORSHAM AND WORTHING ASSESSMENT COMMITTEE.

C. A.

1949

Feb. 7, 8; *Mar.* 17.

Bucknill, Evershed and Denning L.JJ.

Rating—Letting of some rooms in house—Retention of remaining rooms by landlord for own use—No structural alteration or separate door for use of incomer—Presumption that landlord retains control of, not rebutted—One rateable occupation.

H., the owner, in occupation of a house, made an oral agreement with M. (1.) that M. was to have the sole use and occupation of two living-rooms and the kitchen scullery on the first floor of the house, and he was to have a right to use the bathroom and both w.c's in common with H. who (2.) remained in occupation of the rest of the house; three living rooms and a kitchen scullery on the ground floor and also a third living room on the first floor; (3.) M. was to have a right of passage through the entrance hall and over two upper landings and a right of passage through the rooms on the ground floor as and when required for using the outside w.c. and also for gaining access to the yard at the rear to the use of which he was to have a right in common with H.; (4.) the front and back doors were to be used in common, there being no separate entrance to the first floor; (5.) M. was to pay 37*s.* 6*d.* per week (the rent fixed for the accommodation by the tribunal appointed under the Furnished Houses (Rent Control) Act, 1946)—a sum which was to include the use of H.'s carpets on the stairs and in the hall and of linoleum in the rooms occupied by M.; (6.) H. was to keep the hall and landings clean. No structural alteration of the house was made.

At the time of the agreement the rateable value of the house was 54*l.* On the proposal of the rating authority, the assessment committee separately assessed the two living rooms and the kitchen scullery on the first floor inhabited by M. at 22*l.* and the remainder of the house at 44*l.* H. appealed to the Rating Appeals Committee of Quarter Sessions, who dismissed the appeal but stated a case for the Divisional Court—which stated the facts as set out supra. There was no express finding, in terms, by the Appeals Committee that M. was a tenant and not a lodger. The Divisional Court allowed the appeal, holding that the fact that the landlord was living in the premises raised a presumption that he intended to retain control of the whole of the premises, that this presumption was not negatived and, accordingly, that M. was not a tenant, but a lodger. The assessment committee appealed.

Held, that M. had no separate rateable occupation of the rooms occupied by him. *Per* Bucknill L.J. and also by Evershed L.J. (hesitante) on the ground that H., the landlord, continuing to live on the premises, there was no clear evidence of an abandonment by him of his control over the rooms occupied by M. And *per* Denning L.J., on the ground that the landlord, continuing to live on the premises, it mattered not whether M. was a tenant or a lodger.

Per Evershed L.J.: On these facts, the test of rateable occupation was whether the contract between H. and M. was a demise or a licence. Although anomalous, in effect, the test in this case was one of legal title: its justification was to be found in convenience, by affording a criterion both simple and certain. See the speech of Lord Russell of Killowen in *Westminster City Council* v. *Southern Ry. Co.* [1936] A. C. 511.

Per Denning L.J.: On these facts, the test of rateable occupation was whose occupation was paramount. So long as the householder was living in the house, he was prima facie regarded, qua the outside world, e.g., for franchise or rating purposes, as being in occupation of the whole house, whether his contract with the "incomer" were a demise or a licence. But if substantial structural alteration had been made, by which the house was turned into two houses, then the two parts were separately rateable, even though the former householder of the whole house lived in one of them.

Per Evershed L.J.: There seemed to be no reason in logic or in law why the net annual value of a house, as a whole, should vary in the case where a person inhabiting a part of it was a tenant from that in the case where he was a lodger.

Decision of the Divisional Court [1949] 1 K. B. 62, affirmed.

APPEAL from a decision of the Divisional Court (1) on a case stated by the Rating Appeals Committee of Quarter Sessions for the Western Division of the County of Sussex.

On March 8, 1947, the rateable value of No. 78, Brighton Road, Worthing, of which Helman was the rated occupier, was 54*l.* The rating authority for Worthing proposed that the two living-rooms and the scullery-kitchen on the first floor inhabited by one Miles, should be assessed at the rateable value of 22*l.* and the rest of the house at the rateable value of 44*l.* The assessment committee adopted the proposal. Helman appealed to the Rating Appeals Committee of Quarter Sessions, contending that the house should continue to be assessed as one hereditament at 54*l.* The appeal was dismissed, but the Appeals Committee stated a case for the opinion, of the Divisional Court.

By para. 5 of the case stated the following facts were proved or admitted: (*a*) that George Helman was the owner of 78, Brighton Road, Worthing; (*b*) that this dwelling-house was originally designed as a single dwelling, the accommodation being three living-rooms, a kitchen-scullery and a combined bathroom and w.c. on the first floor and three living-rooms, a kitchen-scullery and outside w.c. on the ground floor; (*c*) that in the current valuation list the whole house was assessed as one hereditament at gross value 68*l.* and rateable value 54*l.*; (*d*) that for some time immediately prior to March 8, 1947, Helman let to one Tyler, the same part of the said house as was let by him to one Miles, as hereinafter mentioned.

---

(1) [1949] 1 K. B. 62.

By sub-para. (*e*) that on March 8, 1947, Helman entered into a verbal tenancy agreement with one Miles, the material terms of which were: (i) Miles was to have the sole use and occupation of two living rooms and the kitchen-scullery on the first floor, Helman remaining in occupation of the rooms on the ground floor and the other room on the first floor. (ii) Miles was to have the right in common with Helman to use the bathroom and both w.c's. (iii) Miles was to have a right of passage through the entrance hall and over two upper landings and of a right of passage through the rooms on the ground floor, as and when he required, for the purpose of using the outside w.c. (which was and appeared to have for some time previously been occupied by Helman as a store for deckchairs) and also for gaining access to the yard at the rear to the use of which he had a right in common with Helman. (iv) The front and the back doors were to be used in common, there being no separate entrance to the first floor of the house. (v) Miles was to pay 37*s.* 6*d.* per week (the rent fixed for the said accommodation by the tribunal appointed under the Furnished Houses (Rent Control) Act, 1946) which sum was to include the use of carpets, the property of Helman on the stairs and in the hall and of linoleum laid in the rooms occupied by Miles. And (vi) the hall and landings were to be kept clean by Helman.

By sub-para. (*f*), that in the cupboard under the stairs on the ground floor there were two electric meters one for supplying the part of the house let to Miles and the other for supplying the part of the house occupied by Helman and further there was a shilling-in-slot meter on the first floor for the supply to Miles; (*g*) that pursuant to and under the terms of the said agreement Miles on March 8, 1947, took possession of the rooms let to him, where he had resided ever since on the same terms.

From those facts it appeared that no structural alteration of the house was made by Helman before or at the time of the letting of these rooms to Miles and further the Appeals Committee of Quarter Sessions made no express finding in terms that Miles was a tenant and not a lodger.

The Divisional Court allowed the appeal (1), holding that the fact that a landlord was living in the premises had always been treated as raising a presumption that he intended to retain control of the house, that this presumption had not been displaced and, accordingly, that Miles was not a tenant, but a lodger.

The assessment committee appealed.

Scott Henderson K.C., *Harold Brown* and *Curtis-Raleigh* for the assessment committee. Slade J. agreed with the conclusion of his brother judges in the Divisional Court with some doubt and hesitation. Apart from his conclusion, we accept the judgment of Slade J. as good law. It is clear that the Appeals Committee had no doubt that Miles was a tenant. See Ryde on Rating (8th ed.) at pp. 48–51. The finding in para. 5 (*e*) of the case stated (that Miles was to have the sole use and occupation of two living-rooms and the kitchen-scullery on the first floor, Helman remaining in occupation of the rooms on the ground floor and the other room on the first floor) can only mean that Miles was a tenant. The fact that the landlord would have the right to enter the premises let for the purposes of repair, on which Lord Goddard C.J. relied, is irrelevant on the issue whether Miles was a tenant or a lodger. By s. 16, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is deemed to be a condition of a tenancy, to which the Act applies, that the tenant shall afford to the landlord access thereto and all reasonable facilities for executing repairs. And by s. 12, sub-s. 8, of that Act any rooms in a dwelling-house subject to a separate letting wholly or partly, as a dwelling, shall for the purposes of the Act be treated as a part of a dwelling-house let as a separate dwelling. Paragraph 5 of the case shows that there had been a decision of the tribunal under the Furnished Houses (Rent Control) Act, 1946, with reference to the rooms occupied by Miles and that Act only applies to tenancies. See s. 2 of that Act.

The basis of the judgment of Lord Goddard C.J. in the Divisional Court was the dictum of Pickford J. in *Kent* v. *Fittall* (2) where he said (3): "It has been established by "many cases that if a man lets off rooms in a house in which "he himself resides, although he may give to other persons

---

(1) [1949] 1 K.B. 62.
(2) [1911] 2 K.B. 1102.
(3) Ibid. 1110–1.

C. A.

1949

HELMAN
v.
HORSHAM
AND
WORTHING
ASSESS-
MENT
COMMITTEE.

" exclusive occupation of parts of the house and render no " services to those inmates, he nevertheless prima facie retains " control and the inmates are lodgers and not occupying " tenants." If that dictum is accurate, it is a mere presumption and the fact that the landlord lives on the premises is not conclusive on this issue: *Kent* v. *Fittall* (1). See the judgments of Collins M.R. and Romer L.J. The court must have regard to the actual facts of the occupation and here it was clear that the relationship between Helman and Miles was that of landlord and tenant and Miles was in rateable occupation of these rooms.

Ashe Lincoln K.C. and *Heathcote-Williams* for the landlord. The Appeals Committee made no express finding that Miles was a tenant, but found the facts. For Miles to be rateable, it must be shown that there was a separate holding or hereditament created and that it was separately and exclusively occupied by the tenant. The second question involves the question of control. As to the position of joint occupiers see *Allchurch* v. *Hendon Union* (2). Once it is shown that the landlord lives on the premises there is a presumption that an " incomer " is not a tenant, but a lodger. To rebut the presumption it must be shown that there is not a mere sharing of the house. That was not shown in this case. See *Bradley* v. *Baylis* (3) and the three categories there put by Jessel M.R. Jessel M.R. appears to put forward three tests: (1.) Does the landlord continue to reside on the premises? (2.) Has he demised any part of the premises? and (3.) Does the landlord render any service to the " incomer "? See Ryde on Rating (8th ed.), at p. 44, on the question of control. On the facts found here, the use of the bathroom was a service provided by the landlord; the bathroom was excluded from the rooms let to Miles. There has never been a case where the " incomer " was entitled to use a room which was excluded from the premises let to him, where two separate hereditaments were found to exist, separately rateable. *Kent* v. *Fittall* (1) illustrates the principles laid down by Jessel M.R. in *Bradley* v. *Baylis* (3). As Collins M.R. said in *Kent* v. *Fittall* (4): " It is not disputed that in dealing " with the occupation of part of a dwelling-house, if the

---

(1) [1906] 1 K. B. 60.

(2) [1891] 2 Q. B. 436.

(3) (1881) 8 Q. B. D. 195, 219–20.

(4) [1906] 1 K. B. 60, 70.

"landlord is living in the house, that fact creates a presumption "that the occupation of the other part is that of a lodger "rather than that of an inhabitant occupier." It has been admitted here for the assessment committee that, if Miles was a lodger, the question of separate assessment of the rooms he inhabited could not arise. In the case of *Reg.* v. *Smith* (1) although words implying demise were used, some services being rendered, Hill J. said that they must look not so much to the words as to the substance of the agreement. This case is in favour of the landlord here. See also the judgments of Cockburn C.J. in *Reg.* v. *St. George's Union* (2) cited in Ryde on Rating (8th ed.), at p. 49, and of Blackburn J. in *Allan* v. *Liverpool Overseers* (3).

There was no separation of this dwelling-house into two separate hereditaments.

[EVERSHED L.J. If there was a demise, there must have been such a separation and the question is whether there was a demise.]

There was no demise. See the facts in *Reg.* v. *Smith* (1). It appears that the Appeals Committee gave no consideration to the fact—the prime fact—that the landlord continued to live on the premises, which raised the presumption that Miles was a lodger. It is regrettable that in the Divisional Court the argument was diverted to the effect of s. 23, sub-s. 1, of the Rating and Valuation Act, 1925. In *Westminster City Council* v. *Southern Ry. Co.* (4) Lord Russell of Killowen made some general observations upon rateable occupation in the course of which he dealt with competing occupancy in the case of a lodger (5). There was no carving out here of a separate hereditament. [Evershed L.J. referred to *Cole* v. *Harris* (6).]

Curtis-Raleigh replied.

BUCKNILL L.J. I understand that the question of law propounded by the Appeals Committee of Quarter Sessions was whether from the facts set out in the special case they were entitled as a matter of law to draw the inference that

(1) (1860) 30 L. J. (M. C.) 74. Also reported sub nom. *Smith* v. *Overseers of St. Michael, Cambridge*, 3 E. & E. 383.

(2) (1871) L. R. 7 Q. B. 90, 97.

(3) (1874) L. R. 9 Q. B. 180, 191–2.

(4) [1936] A. C. 511, 529–30.

(5) This passage is set out in the judgment of Evershed L.J. at p. 344.

(6) [1945] K. B. 474.

Miles had a separate rateable occupation of the two rooms and the scullery on the first floor. I find this question, which seems to be mainly one of fact, difficult to answer. It is an important question, because it must affect indirectly innumerable cases. In these times, when there is a great shortage of houses, and the cost of living presses hard on householders, there is a constant tendency for them to arrange with relatives or friends or even strangers to share their house with them. But sharing is difficult, especially in the kitchen, and therefore arrangements are often made whereby the "incomer," to use a neutral word, is granted housing accommodation more or less like a self-contained flat in the house. How much control the landlord intends to give, and how much control the landlord intends to retain is a question of fact in each case. Naturally the landlord, if he remains in occupation, retains control over the whole house. He started with that control and it is reasonable that he should not be held to have parted with it, unless there is clear evidence to that effect. If, for instance, he puts up a separate front door opening on to the "tenant's" rooms, instals in them a kitchen-scullery, bathroom and w.c. and gives a key of the main front door to the tenant, this would be cogent evidence of an intention by the landlord to give up his right of control over the rooms.

There is, however, no cogent evidence of this kind in the present case. No case was cited to us in which a person occupying rooms in a house of this kind in which his landlord continued to live, has been separately rated in respect of those rooms, but several cases were cited in which the landlord was held to remain in occupation of the whole house for the purpose of rateability, although he has granted to another a right to occupy some of the rooms in his house.

Thus in *Reg.* v. *Smith* (1), Smith, the lessee of a house, agreed with the surveyor of taxes and the collector of Inland Revenue to let off five of the principal rooms in the house for an annual rent to include all expenses such as rates, taxes, gas, wood, coals, also providing a person to reside on the premises to keep them clean, light fires and to attend to them. Another room was occupied by Smith as an office, and he himself lived in another house. The rest of the house, viz., two kitchens and a cellar in the basement, and two bedrooms and a sitting room on the second floor, were occupied by a

(1) 30 L. J. (M. C.) 74. Also *Overseers of St. Michael, Cambridge,* reported sub nom. *Smith* v. 3 E. & E. 383.

C. A.

1949

HELMAN
v.
HORSHAM
AND
WORTHING
ASSESSMENT
COMMITTEE.

Bucknill L.J.

servant of Smith, who cleaned the rooms and lighted the fires. Smith was rated for the whole house, and the question was raised whether under the circumstances set out above he was liable to be rated in respect of the house or any part thereof. The case was heard by Hill J. and Blackburn J. Hill J., in the course of a considered judgment of the court said (1): "There is no doubt that exclusive possession of "a part only of a house may be given, so as in effect to make "the two parts of the house separate tenements; the question "in the present case was whether such possession had been "given and we are of opinion that it had not . . . . We "think that we must look not so much to the words as the "substance of the agreement, and taking the whole together, "we think it must be construed, not as a demise of the five "rooms, but as an agreement by which the appellant retaining "possession of these rooms and keeping his servant there, "bound himself to supply the other party there with fire, "gas and attendance. It is true that the exclusive enjoyment "of the rooms is to be given, but that is the case where a guest "in an inn, or a lodger in a house has a separate apartment, "or where a passenger in a ship has a separate cabin, in which "cases it is clear that the possession remains in the innkeeper, "lodging house keeper, or shipowner. We think, therefore, "that the appellant was occupier of the whole of the rated "premises."

Many cases were cited to us supporting the statement in the judgment of Lord Goddard C.J. in the present case (2) that: "the fact that the landlord is living on the premises "does seem to me to raise the presumption and has always "been treated in these cases as raising a presumption that "the landlord intends to retain control of the whole of the "premises, and if the landlord intends to retain control of "the whole of the premises, prima facie, at least that negatives "the fact that the person who is occupying rooms in a part "of the house other than that in which the landlord lives, "is a tenant in the true sense and not a lodger." In *Kent* v. *Fittall* (3), the question was raised whether a person resident in part of a house was an inhabitant occupier or a lodger within the meaning of those words as used in the Representation of the People Act, 1867. Sir Richard Henn Collins M.R., in the course of his judgment, said (4): "It is not disputed

---

(1) 30 L. J. (M. C.) 74, 76.

(2) [1949] 1 K. B. 67.

(3) [1906] 1 K. B. 60.

(4) Ibid. 70.

C. A.

1949

Helman v. Horsham and Worthing Assessment Committee.

Bucknill L.J.

"that in dealing with the occupation of part of a dwelling-"house, if the landlord is living in the house, that fact creates "a presumption that the occupation of the other part is that "of a lodger rather than that of an inhabitant occupier. "But while that is the inference that may be drawn, it is not "a necessary inference of law, and there is no authority that "it is to be treated as conclusive." And he cited with approval the following passage from the judgment of Lord Porter M.R. in Ireland, in *Hogan* v. *Sterrett* (1): "I do not mean to decide "that in every case where the landlord resides under the "same roof the persons occupying the other portions of the "structure may not be entitled otherwise than as lodgers. "I think they may be entitled; but the evidence of separate "occupation must be very clear—such as in the case of "'flats'; for there the landlord would live in a separate "'house' within the meaning of the Act and there would be "several 'dwelling-houses' all under the same roof."

Can it be said that in the present case the "evidence of "separate occupation" is very clear? Apart from the use of the words "sole use and occupation" in the oral agreement, there does not seem to me any evidence which may not be said to be neutral, i.e., applicable either to a tenancy or to a lodging. The words "sole use and occupation" are not, I think, conclusive of the matter, because a man may have the exclusive use of the rooms and yet be a lodger, as appears from the judgments of Blackburn J. in *Allan* v. *Liverpool Overseers* (2), and of Sir George Jessel M.R. in *Bradley* v. *Baylis* (3).

I think that the Appeals Committee in this case must have had some doubt whether the sole occupation by Miles of these three rooms was in law a rateable occupation. Otherwise, I do not understand why they stated a case for the opinion of the Divisional Court. In my opinion, the proper answer to their question is that, unless there was clear evidence of the intention of the landlord to abandon control of the rooms in question, there was not a rateable occupation by Miles; that the question of the amount of control retained by the landlord is a question of fact, and that the statement of facts in the special case does not set out any clear evidence of an abandonment by the landlord of his control over the rooms occupied by Miles. Therefore, the conclusion that Miles

(1) (1886) 20 L. R. Ir. 344, 349.

(2) L. R. 9 Q. B. 180, 191–2.

(3) 8 Q. B. D. 195, 219–20.

had a separate rateable occupation of the rooms in question was wrong. For these reasons, I think that this appeal should be dismissed.

EVERSHED L.J. On a question such as that raised in the present appeal I take as the foundation upon which a conclusion should be built the observations of Lord Russell of Killowen in *Westminster Council* v. *Southern Ry. Co.* (1), and I shall I hope be forgiven for quoting from the noble Lord's speech at some length. " In the next place I would " make a few general observations upon rateable occupation. " Subject to special enactments, people are rated as occupiers " of land, land being understood as including not only the " surface of the earth but all strata above or below. The " occupier, not the land, is rateable; but, the occupier is " rateable in respect of the land which he occupies. Occupation, " however, is not synonymous with legal possession: the " owner of an empty house has the legal possession, but he " is not in rateable occupation. Rateable occupation, however, " must include actual possession, and it must have some " degree of permanence: a mere temporary holding of land " will not constitute rateable occupation. Where there is " no rival claimant to the occupancy, no difficulty can arise; " but in certain cases there may be a rival occupancy in some " person who, to some extent, may have occupancy rights " over the premises. The question in every such case must " be one of fact—namely, whose position in relation to " occupation is paramount, and whose position in relation " to occupation is subordinate; but, in my opinion, the " question must be considered and answered in regard to the " position and rights of the parties in respect of the premises " in question, and in regard to the purpose of the occupation " of those premises. In other words, in the present case, " the question must be, not who is in paramount occupation " of the station, within whose confines the premises in question " are situate, but who is in paramount occupation of the " particular premises in question.

" A familiar instance of this competing occupancy is the " case of the lodger. It has long been settled on the one " hand that, in the case of lodgers in a lodging house, the " lodgers are not rateable in respect of their occupancy of " their rooms, but that the landlord is the person who is

(1) [1936] A. C. 511, 529.

C. A.

1949

HELMAN
v.
HORSHAM
AND
WORTHING
ASSESSMENT
COMMITTEE.

Evershed L.J.

" rateable in respect of his occupancy of the entire house. " In view of the frequently fleeting nature of the occupancy " of a lodger, the convenience of this view, indeed the necessity " for it, is obvious; but it purports to be based upon the " paramountcy of the landlord's occupation, arising from " his control of the front door and his general control over " and right of access to the lodgers' rooms for the proper " conduct of the lodging house. And the same view as to " rateability has prevailed in the case of the business lodger. " On the other hand, the occupation of a person residing " in a flat is such that he is (generally speaking) rateable, " although, as a matter of practice, the owner of a block of " flats usually pays the rates charging the tenant an inclusive " rent.

" My Lords, I cannot but feel that the position of the lodger " in relation to rateability is an exceptional one, and is largely " the product of practical considerations. But it can, I " think, be justified and explained when we remember that " the landlord, who is the person held to be rateable, is " occupying the whole premises for the purpose of his business " of letting lodgings, that for the purpose of that business he " has a continual right of access to the lodgers' rooms, and " that he, in fact, retains the control of ingress and egress " to and from the lodging house, notwithstanding that the " power of ingress and egress at all hours, is essential to the " lodger. The general principle applicable to the cases where " persons occupy parts of a larger hereditament seems to be " that if the owner of the hereditament (being also in occupation " by himself or his servants) retains to himself general control " over the occupied parts, the owner will be treated as being " in rateable occupation; if he retains to himself no control, " the occupiers of the various parts will be treated as in " rateable occupation of those parts."

If this statement of the law to be applied is correct (as it must, I think, be taken to be) then it appears to follow that though, in general, legal title is not the test of rateability, nevertheless, in the special case of one who occupies rooms in the house of another, in effect it is. As Lord Russell of Killowen observed, the case is anomalous but its justification can be found in convenience—including, I think, the convenience of having a criterion both simple and certain.

I have had the advantage of reading the judgment which is about to be delivered by my brother Denning in which he

C. A.

1949

HELMAN
v.
HORSHAM
AND
WORTHING
ASSESS-
MENT
COMMITTEE.

Evershed L.J.

expresses the view that although, as between them, the reationship of Helman and Miles may be, in law, that of lessor and lessee, nevertheless (in the absence at any rate of structural severance of the "tenement" of Miles from the rest of the house) so long as Helman continues to reside himself in the house, for rating purposes and indeed for all purposes other than those affecting the legal rights and obligations inter se of Helman and Miles, Miles will be regarded as a lodger and Helman will be regarded as retaining the "paramount occupation" of the whole premises: and my brother has referred to a number of the older decisions of the courts both civil and criminal. Upon such a question I should not differ from Denning L.J. save with the greatest diffidence: and on the view at which I have arrived it is not strictly necessary for me to express a concluded opinion. I feel, however, bound to say that as at present advised, I am not satisfied that the test for rating liability in such cases as the present is that which my brother has stated, and I should certainly wish to hear argument upon the authorities to which he has referred. For, as it seems to me at present, the three cases *Reg.* v. *Rogers* (1); *Lee* v. *Gansel* (2); and *Monks* v. *Dykes* (3), all turned upon a finding that the person whose rooms were alleged to have been broken into was in fact a lodger and had no such estate or interest therein as would be conferred by a contract of letting. I think the ratio decidendi was the same in the franchise cases. *Phillips* v. *Henson* (4), turned, in my judgment, on the effect of the Lodgers' Goods Protection Act, 1871. In the rating case of *Rex* v. *St. Mary the Less, Durham* (*Inhabitants*) (5), the question was whether the householder who used his house for the purposes of his hobby (without ever residing in it) and allowed some poor people to live in the kitchen was an occupier of the house. There was no question of the poor occupants of the kitchen being his tenants. And in *Smith* v. *Overseers of St. Michael, Cambridge* (6), the finding of the court was that, notwithstanding the language used in the agreement there in question, there was in fact no demise. Finally, such a test appears to me prima facie inconsistent with the decision of this court in the first of the *Kent* v. *Fittall* cases (7) (to which

(1) (1772) 1 Leach 89.
(2) (1774) 1 Cowp. 1.
(3) (1839) 4 M. & W. 567.
(4) (1877) 3 C. P. D. 26.
(5) (1791) 4 Term Rep. 477.
(6) 3 E. & E. 383. Also reported sub nom. *Reg.* v. *Smith* 30 L. J. (M. C.) 74.
(7) [1906] 1 K. B. 60.

I shall refer again in reference to the "presumption" on which the Divisional Court relied), where the claimant to the franchise was held entitled to the vote, though his tenement was not structurally severed from the rest of the house and the house owner himself resided in the premises (see the final sentences of the judgment of Mathew L.J.). I am also disposed to think that some regard should now be had to the changed social and economic circumstances of the time. In the more spacious days of the eighteenth and nineteenth century householders were not disposed to "sub-let" parts of their houses to the extent to which they are compelled or encouraged to-day by financial needs and the shortages of housing accommodation and staff. Complete structural sub-division is by no means always possible. Is it right that the intended relationship between householder and "inmate" depends upon structural severance or that the extent of structural severance should necessarily determine what that relationship should be taken to be? Is a sharing of the front door and staircase or (in addition) of a garden or a downstairs cloak-room decisive of the character of the relationship for some and what purposes? Therein is a prospect of almost endless controversy and litigation and no clear standard for decision.

I agree that the test not only for rating purposes but as I think, for other purposes is what has been referred to as "control" or "paramount occupation": but that test is to be applied, as observed by Lord Russell of Killowen (loc. cit.) as regards the particular rooms in question in the litigation rather than in reference to the house as a whole. If in the present case Miles, when going away for a week-end, is entitled to lock his doors and say to Helman: "I do not want either "you or anyone else to go into my rooms while I am away," then he has, prima facie, such exclusive occupation of his rooms as would be consistent with a tenancy, but inconsistent with the position of a lodger. If this view is the right one, the result may be inconvenient for rating authorities; since when there is a tenancy they would (as I follow it) be bound to rate separately the tenant in respect of the rooms covered by the demise. But if that is the result in the case of a self-contained flat, I cannot see anything illogical in similarity of effect in the case of chambers or rooms in fact sub-let though not structurally severed from the rest of the house.

But whether or not the view to which I incline is the correct one, the first question in the present case is—What did the

C. A.

1949

Helman v. Horsham and Worthing Assessment Committee.

Evershed L.J.

Appeals Committee of Quarter Sessions decide and intend to decide? It is upon this question that I have found the greatest difficulty. Bucknill L.J. has summarized the material paragraphs of the case and I will not take time by making further reference to them. The problem is, on a fair reading of the case, did the Appeals Committee find and intend to find that in fact Miles was tenant of the rooms of which he was given the exclusive use (together with certain other privileges), or did they find and intend to find only that there was an agreement between Helman and Miles in the terms set out in para. 5 (*e*), plus the fact that Miles was in "possession" of his rooms under that agreement? It has been much stressed on the respondent's behalf that there is no finding in terms upon the vital matter of "control" and that, in the absence of such a finding or of any indication that that essential matter was present at all to the minds of the Appeals Committee, the special case cannot be read in the sense of the former of the above alternatives—or, if it is, then that the finding cannot stand by reason of the absence of the facts essential to support it. I should not for my part be prepared to say that the Appeals Committee could not have validly and properly found as a fact that Miles was a tenant and not a lodger without any express finding in regard to control or paramount occupation. Nevertheless, the absence of any such reference is significant. True it is that Helman (who conducted his case in person before Quarter Sessions) did not appreciate the point and appears to have used language consistent with the view that he conceived Miles to be his tenant rather than his lodger. But it was for the rating authority to make good their case: and (having regard to the existence of the presumption presently referred to) I do not think they can properly rely upon Helman's failure to put his case in the best way. I have, therefore, on the whole, come to the conclusion that the view taken by Bucknill L.J. ought to prevail, and that the case stated cannot be read as containing and intended to contain a finding of fact that Miles was Helman's tenant and not his lodger. If this view is right, how does the matter stand? I cannot for myself derive assistance from the fact (which I assume) that Helman is entitled to go into Miles' room for the purpose of fulfilling his obligation to do repairs. Such a right is commonly enough found in what are indubitably leases, and its presence seems to me to have but little bearing upon the matter of paramount occupation. Nor do I attach importance to the sharing of the bathroom and w.c. It is not suggested on any view that the bathroom was included in the alleged demise: and if it be the fact (on which I express no opinion) that the Furnished Houses (Rent Control) Act, 1946, applies to rooms "let" to lodgers, still in its context I regard the reference to the Act as inclining more towards the existence of a demise. On the other hand it is clear that the use of words—"let," "rent," even "tenancy"—strictly appropriate to a demise is by no means conclusive. The cases referred to by Bucknill L.J. amply illustrate the point. In the case of lodgers (properly so called) I take it that the words "let" and "rent" are commonly if not normally used.

There then remains the effect of the "presumption" on which the Lord Chief Justice substantially relied. The existence of "presumptions," whether of law or fact, must, in my judgment, be accepted with some caution. Bucknill L.J. has already referred to the judgment of Collins M.R. in the earliest of the *Kent* v. *Fittall* cases (1). It is, however, to be noted that the decision in that case was in favour of the existence of a tenancy and that neither Romer L.J. nor Mathew L.J. referred to the "presumption." And although in the latest *Kent* v. *Fittall* case (2) the decision of the Divisional Court was affirmed, it was affirmed on special grounds which did not involve the acceptance of the dictum of Pickford J. It is, I think, clear that, if in any case it appears that some rooms in a man's house where he himself lives are occupied by another who pays for that privilege, the inference proper to be drawn from those facts of themselves—whether for purposes of rating liability, franchise or any other purpose—is that the latter is the former's lodger. But it does not seem to me that where, in addition to the facts of occupation, there is further evidence of the nature of the relationship between the occupants, there is anything in the authorities which fetters the right of the court to reach conclusions which naturally flow from the evidence given.

But these observations still leave unsolved the problem in the present case where, ex hypothesi, the Appeals Committee has not found as a fact one way or the other, whether Miles was a tenant or a lodger. I have felt much sympathy for the view expressed by Singleton J. (as he then was) that the case should be referred back to Quarter Sessions: but, as pointed out by the learned judge, there was no request for such a direction, and it is now, I think, manifestly too late. It became the duty of the Divisional Court, and is now the duty of this court, to do the best it can on the facts which alone (as I construe the special case) were found, i.e., that both Miles and Helman occupied the premises the occupancy of Miles being governed by the terms of the agreement set out in para. 5 (*e*) of the case. And upon these facts I have come to the conclusion that it is sufficient to say, in the light of the judgment of Collins M.R., and the cases cited by him to which Bucknill L.J. has referred, that the rating authority has not established a tenancy and, therefore, a rateable, occupation on the part of Miles. In the result, in my opinion the appeal must fail.

---

(1) [1906] 1 K. B. 60.

(2) [1911] 2 K. B. 1102.

I add only this. In the present case the figures have not been disputed. It has, therefore, been conceded or assumed that the net annual value of the house as a whole is greater upon the footing that Miles is a tenant of Helman of certain of the rooms than it would be if Miles were not a tenant but a mere lodger. In so stating I may do an injustice to the assessment committee. In any case, however, I cannot as at present advised see any reason in logic or in law why the net annual value of the house as a whole should vary in accordance with the answer to the question: Have certain of the rooms been "let" to a tenant upon a demise or to one who is a mere lodger in them? Financially, the result to the landlord appears to be the same. Indeed, having regard to the Rent Restriction Acts, it may be better for the landlord if the inmate is a lodger and not a tenant. I must not, therefore, be taken to be assenting in any way to the view that if, because the "inmate" of certain rooms is held to be a tenant rather than a lodger, separate assessments may be made of two separate and independent "hereditaments," the arithmetical result is to increase the net annual value of the house as a whole.

DENNING L.J. It is no new thing for a house to be occupied by several families. If each family occupies a part of the house which is structurally separate from the other parts, as in the case of chambers or flats, then the law has always treated each part as a separate house for all purposes. But it continually happens that a house which is built for one family is occupied by more than one family without there being any structural severance at all. A householder simply lets some or all of the rooms. The tenants may have the exclusive use of their own rooms but they share other parts of the house such as the passages, stairs and lavatories in common with the other occupiers. When that happens the rights of the householder and occupier, as between one another, are of course governed by the contract between them and much may turn, for them, on whether it is, in law, a demise or a licence. But other people are not concerned with that sometimes nice distinction. Whenever a question arises with the outside world, the principal distinction that has been taken by the law depends on whether the householder is still living in the house himself or not. So long as he is living there himself, he is, prima facie, regarded as being in paramount occupation of the whole and the tenants are regarded as lodgers; but when he leaves the house and lets out all the rooms, then the individual tenants are occupiers.

This distinction has been drawn ever since the days of Lord Holt by some of the greatest names in the law. If, for instance, a resident owner lets out rooms to a tenant and a burglar should break into the rooms that are let, the indictment charges him not with breaking into the tenant's rooms, but into the owner's house, because the owner is in paramount occupation of the whole. (See the opinion of Lord Holt in 1701 quoted in *Rex* v. *Rogers* (1).) Again if a sheriff comes with a lawful warrant to levy execution on the tenant's goods, he is not entitled to force the outer door of the owner's house; but if he finds it open he is entitled to go in and force open the doors of the rooms that are let: because the owner is in paramount occupation of the whole and, whilst the law will protect his outer door, it will not protect the inner doors. (See *Lee* v. *Gansel* (2), per Lord Mansfield.) So also if there is a disturbance in the tenant's rooms, it is the owner, and not the tenant, who has the right to eject the disturber from the house and to sue in trespass quare clausum fregit. (See *Monks* v. *Dykes* (3), per Parke B.) Furthermore, when the goods of a lodger were protected by statute from distress, a person to whom the resident owner let rooms under a demise was regarded as a lodger. (See *Phillips* v. *Henson* (4), per Lindley J.) And in the days when there was one vote for house-holders, that is occupiers, and no vote at all for lodgers—or a different kind of vote—the resident owner was always regarded as the occupier of the house and the tenants of the rooms were regarded as lodgers. (See *Wansey* v. *Perkins* (1); *Morfee* v. *Novis* (2); and *Kent* v. *Fittall* (3).) If you examine those three franchise cases you will find that in each of them there was a demise and not a licence, but nevertheless the tenant of the rooms was regarded as a lodger: and if you examine the judgments in the leading case of *Bradley* v. *Baylis* (4), you will find that four Lords Justices expressly contemplate that a tenant in the ordinary acceptation of the word may yet be a lodger for franchise purposes (5). The principal distinction taken was whether the owner was living in the house himself or not, though of course it is not conclusive. The case of *Kent* v. *Fittall* (6) shows that circumstances may arise in which the owner, although living in the house, is in no sense in control of it, in which case the tenants are not lodgers for franchise purposes. These franchise cases have, as I think rightly, always been regarded as authority in rating cases because the Franchise Acts applied the test of rateability. (See *Bradley* v. *Baylis* (7).)

---

(1) (1772) 1 Leach 90, n. (*a*).
(2) 1 Cowp. 1.
(3) 4 M. & W. 567, 569.
(4) 3 C. P. D. 26, 32.

Although I have not actually found an instance in a rating case of rooms let on a demise, nevertheless I find the same principal distinction being drawn in them. If the owner or his servant is living in the house, he has always been regarded, prima facie, as being in rateable occupation of the whole. (See *Rex* v. *St. Mary the Less, Durham* (*Inhabitants*) (8) and *Smith* v. *Overseers of St. Michael, Cambridge* (9).) But if the householder leaves and lets off all the rooms, then the individual tenants are the occupiers. (See *Allchurch* v. *Hendon Union* (10).) This distinction is in full accord with the settled rule that rateability depends on occupation, not on title. Where there are rival occupancies, it depends on whose occupation is paramount. (See *Westminster Council* v. *Southern Ry.* (11).)

The upshot of the whole discussion is that where there is a resident owner who lets out rooms, he is regarded as in paramount occupation unless the facts negative that inference. That is the rule which the Lord Chief Justice, as I understand it, stated in this case (1), and I entirely agree with his statement of it. Of course, if substantial structural alterations are made by which the one house is turned into two houses, then the two parts are separately rateable even though the owner lives in one of the parts himself. That was laid down by Lord Holt in *Tracy* v. *Talbot* (2), and by the Lord Chief Justice in the present case (1). Such cases depend on the degree of structural severance, a matter which the rating authority are called upon to consider under s. 23 of the Rating and Valuation Act, 1925. But I am only concerned here with cases where there is no structural severance.

---

(1) (1845) 7 M. & G. 151.
(2) 8 Q. B. D. 200.
(3) [1911] 2 K. B. 1102.
(4) 8 Q. B. D. 195.
(5) Ibid. 224, 235, 240 and 245.
(6) [1906] 1 K. B. 60.
(7) 8 Q. B. D. 195, 217–18.
(8) (1791) 4 Term Rep. 477.
(9) 3 E. & E. 383; reported sub nom. *Reg.* v. *Smith* 30 L. J. (M. C.) 74.
(10) [1891] 2 Q. B. 436.
(11) [1936] A. C. 511, 533 and 562.

I would point out, however, that where a house is shared by tenants of an absent landlord, rating authorities have obtained by statute special permission to be able to treat the landlord, not the tenant, as the person rateable. (See s. 23 of the Rating and Valuation Act, 1925.) But as the Lord Chief Justice pointed out that section does not apply to a resident landlord sharing the house with a tenant, because he always has been rateable for the whole. If the contention of the rating authority in this case were right, it would mean that a resident owner could only be rated for his own part and not for the rooms occupied by his tenant. That would, I fancy, be very inconvenient for the rating authorities.

One final word. In holding that Mr. Miles is to be regarded as a lodger for rating purposes, I do not wish it to be supposed that I think he is to be regarded as a lodger for the purposes of the Rent Restriction Acts. He plainly is not. On the facts stated, it seems to me that he is a tenant protected by those Acts and not a mere licensee. (See *Cole* v. *Harris* (3).) The fitting of a separate meter and cooker was not a sufficient structural alteration to make the single house lose its identity. (See *Monk* v. *Murphy* (4) which we decided a few days ago.) It is for this reason that I think it important to say that, in my opinion, in this branch of rating law, as in others, the distinction between a demise and a licence is not the test of rateable occupation, (see the words of Lord Wright in *Westminster Council* v. *Southern Ry.* (5)), and, if it is not the test, then paramount occupation is the test. Applying that

---

(1) [1949] 1 K. B. 67.
(2) (1705) 2 Sak. 532.
(3) [1945] K. B. 474.
(4) [1949] 1 All E. R. 786.
(5) [1936] A. C. 511, 561–2.

C. A.

1949

HELMAN
v.
HORSHAM
AND
WORTHING
ASSESSMENT
COMMITTEE.

test, I agree with the Lord Chief Justice that there was only one conclusion to which Quarter Sessions could come on these facts, namely, that the premises should be rated as one hereditament and not two.

For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the assessment committee: *Waller, Neale & Houlston, for Marsh and Ferriman, Worthing.*

Solicitors for the landlord: *A. Kramer & Co.*

C. G. M.

Explained and Applied. WILSON v. INYANG. [1951] 2 All E.R. 237.

1949
May 9, 17.

Lord Goddard C.J., Oliver, Birkett, Lynskey and Sellers JJ.

YOUNGHUSBAND v. LUFTIG

Medical practitioner—Unregistered person—Doctor of Medicine of Berlin University—Use of descriptions "Doctor of Medicine" and "M.D., BLN"—Medical Act, 1858 (21 & 22 *Vict. c.* 90), *s.* 40.

The respondent was a Doctor of Medicine of Berlin University. His name was not on the medical register established by the Medical Act, 1858. He practised at Brighton as an eye consultant and described himself on his notepaper and professional door plate as "M.D., BLN". On June 11, 1948, he was charged before Brighton justices with wilfully and falsely using the title of "Doctor of Medicine," contrary to s. 40 of the Medical Act, 1858; and with wilfully and falsely using the description "M.D." thereby implying that he was registered under the Act.

The justices held that the respondent did not wilfully and falsely use the title "Doctor of Medicine," and that the letters "M.D., BLN" did not imply that he was registered under the Medical Act. They accordingly dismissed the informations.

Held: To commit an offence against s. 40, a defendant must act wilfully and falsely. The presence or absence of mens rea is a question of fact for the justices. The use of the titles specifically mentioned in the first part of s. 40 necessarily implies that the person so described is qualified for registration under the Act. However qualified a person may be, if he is not registered, and he uses a title implying that he is registered, he commits an offence. A Doctor of Medicine of Berlin University commits no offence by describing himself as "M.D., Berlin." Whether the description "M.D., BLN" was used wilfully and falsely, and whether it implied registration, were questions of fact for the justices.

Jutson v. *Barrow* [1936] 1 K. B. 236, considered.

[Reported by MRS. L. A. BUCHER, Barrister-at-Law.]

CASE stated by justices for the County Borough of Brighton.

The appellant preferred two informations against the respondent alleging that he on April 1, 1948, at the County Borough of Brighton, did wilfully and falsely use the title of Doctor of Medicine, contrary to s. 40 of the Medical Act, 1858; and on the same day and at the same place, did wilfully and falsely use the description M.D., thereby implying that he was registered under the Medical Act, 1858, contrary to s. 40 of that Act. Two further informations in the same terms were preferred in respect of May 25, 1948.

The case was heard on June 11, 1948, before Brighton justices, who dismissed the informations. The appellant being dissatisfied with the justices' determination requested them to state a case. The justices refused, but in November, 1948, the High Court ordered them to do so, and accordingly they stated the following case:—

The respondent Luftig studied medicine in Germany and passed his final examination in 1913. In 1914 he was awarded by Berlin University a diploma which entitled him to describe himself as "*Doctoris Medicinæ*" of which degree the letters M.D. are the recognized abbreviation. The respondent became a naturalized British subject on January 3, 1938. He practised medicine in London, Northampton, and since August, 1944, at Brighton, as a consultant on eye troubles. The respondent has written four books in the English language on eye trouble and the name of the author is set out on the title page of each book as "William Luftig, M.D." in large block lettering, and underneath in small lettering in brackets the words "Graduate of the University of Berlin." The respondent's name does not appear on the current Medical Register and he is not registered under the Medical Act, 1858.

In January, 1940, the secretary of a body called the Medical Defence Union, wrote in the following terms to the respondent:

"My attention has been drawn to the London Telephone "Directory in which you are described as
"'Luftig, William, M.D., Berlin, Physn.'

"As I do not find you name on the Medical Register, the "use by you of the title 'Physician' is a direct infringement "of the Medical Act and renders you liable to serious penalties. "I would draw your attention to the decision in the case of "*Whitwell* v. *Shakesby* (1), where it was decided that it is illegal "for any person to make use of the word 'Physician' associated

---

(1) (1932) 147 L. T. 157.

"with any qualifications of any kind, unless he be an individual "whose name appears on the Medical Register.

"Before taking further steps in the matter, I shall be glad "to know that you will not in future make use of this title "or any other description calculated to mislead the public."

The respondent did not thereafter use the term "Physn.," but continued to described himself as "M.D. Berlin" until 1944 when he moved to Brighton. Thenceforward, for the reason that he had received threatening letters, and that the wall of his house had been marked with swastikas, the respondent substituted the description "William Luftig, M.D. BLN" on his notepaper and on a professional plate put up on his door on May 25, 1948. In Brighton telephone directory the relevant entry was "Luftig, William, M.D., B.L.N." but the full stops were added to "BLN" by error of the printer. In Kelly's Directory the entry is "William Luftig, M.D. Berlin."

The respondent never used the description "M.D." without at least the qualification "BLN," and he informed his patients either orally or in writing that he was not on the British Medical Register and that he held a Berlin degree.

In March, 1948, the appellant wrote to the respondent requesting an appointment, and received from the respondent a letter dated April 1, 1948, and headed "William Luftig, "M.D., BLN". The appellant accordingly preferred the above mentioned informations against the respondent.

The justices being of the opinion that the respondent had not wilfully and falsely used the title of Doctor of Medicine held that the informations alleging that offence should be dismissed, and being of the opinion that the respondent had used the description "M.D., BLN" and not "M.D." simply as stated in the summons, held that the letters "M.D., "BLN" did not imply that he was registered under the Medical Act, 1858, and the informations alleging that offence should also be dismissed.

The question for the opinion of the court was whether the justices had come to a correct determination in point of law.

C. R. Havers K.C. and *Harold Brown* for the appellant: The intention of the Medical Act, 1858, as stated in the preamble is to enable persons requiring medical aid to distinguish between qualified and unqualified medical practitioners. The Act makes provision for the registration of persons possessing one or more of the recognized medical degrees specified in sch. A. Section 40 (1) makes it unlawful for anyone, unless so registered, (or, at least, so qualified) to describe himself as a Doctor of Medicine. The prohibition is absolute, and under this part of the section it is not necessary to prove that those words contain any implication of registration. Luftig's German degree does not qualify him for registration under the Act. In the latter part of the section, the prohibition is against the use by a practitioner of a description which implies that he is registered under the Act, or that he is recognized by law as a physician, surgeon, etc. It is not a question of what the respondent intended but what was implied in and from the description; see per Singleton J. in *Jutson* v. *Barrow* (2).

The Act does not prohibit unregistered persons from practising here, but only from using certain specified descriptions or from implying registration. It is not an offence to use such descriptions about a person who does not practise, but in respect of a person who does practise, even the use of the expression "M.D. Berlin" would constitute an offence. *Jutson* v. *Barrow* (2) is authority for the proposition that the use by unregistered persons of any of the prohibited descriptions, however qualified, is contrary to s. 40.

D. E. Evans for the respondent: A review of the authorities since 1860 shows that the true interpretation of s. 40 turns on the question of wilful falsity. There are two limbs to this section: a prohibition against the use, wilfully and falsely, of certain specific descriptions; and a prohibition against the use, wilfully and falsely, of any name implying registration under the Act. In both cases the prosecution must prove mens rea; in the second case they must also prove that the word used implied registration.

In this case, as in *Ellis* v. *Kelley* (3), the description was not used wilfully and falsely. That is a question of fact for the justices: *Andrews* v. *Styrap* (1).

---

(1) Medical Act, 1858, s. 40: "Any person who shall wilfully "and falsely pretend to be or "take or use the Name or Title "of a Physician, Doctor of "Medicine, Licentiate in Medicine and Surgery, Bachelor of "Medicine, Surgeon, General "Practitioner or Apothecary, or "any Name, Title, Addition or "Description implying that he "is registered under this Act, "or that he is recognized by law "as a Physician, or Surgeon, or "Licentiate in Medicine and Surgery, or a Practitioner in "Medicine, or an Apothecary, "shall, upon a summary conviction for any such offence, pay "a sum not exceeding Twenty "Pounds."

(2) [1936] 1 K. B. 236, 252.

(3) (1860) 6 H. & N. 222.

In the statutes relating to solicitors, dentists and veterinary surgeons, the words "wilfully and falsely" do not appear. In those Acts the prohibition is absolute. In the Medical Act the prohibition is qualified by the words "wilfully and falsely." Therefore, if a man has a genuine degree, he commits no offence under the Act if he describes himself as a Doctor of Medicine, even though he omits the word "Berlin," because he states nothing that is false. Admittedly, the term BLN is used to divert attention from the fact that the respondent was qualified in Germany, but the expression itself puts the public on notice.

So far as the first information is concerned—wilful and false user of the title Doctor of Medicine—the court is bound by the findings of the justices on this question of fact, unless satisfied that there is no reasonable evidence on which they could form that opinion. There is abundant evidence in this case to support the finding.

On the summons relating to the use of the title "M.D.", that was qualified by the letters "BLN". The justices were entitled to take into consideration that the respondent was a man with thirty-five years' reputation who was clearly not out to defraud the public in any way but only to protect himself from a nuisance. They were entitled to come to the conclusion that there was no wilful falsity in the use of the term "M.D., BLN," and that it did not imply registration under the Act.

Counsel referred to a number of cases which are reviewed seriatim in the judgment.

Havers K.C. in reply. Upon the major question of interpretation of s. 40, the object which the statute has in mind is to distinguish between qualified and unqualified persons. Unless a man possesses one of the qualifications specified in the Act, he is unqualified. Parliament has not imposed on the courts the burden of deciding what foreign qualifications, if any, are good.

Some of the earlier cases are at variance with *Jutson* v. *Barrow* (2) as to the meaning of "wilfully and falsely." In that case it was argued that mens rea was necessary, but the court held the contrary: see per Lord Hewart C.J. (3).

(1) (1872) 26 L. T. 704.
(2) [1936] 1 K. B. 236.
(3) Ibid. 241.

If a man has a non-registrable title and, knowing it to be so, he uses it, he commits an offence. This respondent, as he frankly says, used the term "BLN" for the express purpose of concealing from the public his German degree. This is a question of construction of a document—a piece of notepaper inscribed "M.D., BLN"—and is a question of law for this court to determine. But even on the footing that it is a question of fact, the justices' decision is contrary to the evidence, and this court can interfere.

The vital question is whether a person who holds a foreign diploma entitling him to the degree of doctor of medicine can practice in this country and describe himself as "M.D." or use the title "Doctor ot Medicine."

Cur. adv. vult.

May 17. The judgment of the Court was read by LORD GODDARD C.J.

The respondent was charged before a Court of Summary Jurisdiction for the County Borough of Brighton firstly for that he on April 1, 1948, did wilfully and falsely use the title of Doctor of Medicine contrary to s. 40 of the Medical Act, 1858, secondly that on the same day he did wilfuly and falsely use the description "M.D." thereby implying that he was registered under the Medical Act, 1858, contrary to s. 40 of the said Act. There were also two similar summonses alleging the same offences on May 25, 1948. The two offences charged on each day are, in fact, alternative, and in respect of each day to which they relate the respondent, if convicted, would only be liable to one penalty. The informations were dismissed.

The material facts are that on April 2, 1948, the appellant who was a representative of the Medical Defence Union received from the respondent a reply to a letter which he had written requesting an appointment. The letter bore on the left-hand corner the words "William Luftig, M.D., BLN". The letter was written from 44 Preston Park Avenue, Brighton, where the respondent lives and carries on the practice of consultant on eye troubles. On May 25 there was fixed to the door of these premises a professional plate bearing the words and letters "William Luftig, M.D., BLN". The respondent's name appeared in the telephone directory for Brighton with the same letters after his name but in that directory full stops appear after each of the letters, while on the letter paper and plate there were no stops. The magistrates find that the stops in the directory were a printer's error and were not on the entry form completed by the respondent. In Kelly's Directory for the district his name is given as "William Luftig M.D. Berlin." The justices found that the respondent used the abbreviation "BLN" on his plate and notepaper since coming to Brighton in 1944 and that he had not used the word "Berlin" because he had received threatening letters and swastikas had been marked on the wall of his house. The respondent had studied medicine in Germany and passed his final examination in June, 1913. In August, 1914, he had been granted by the Minister of the Interior "Approval as a Physician" and in November, 1914, the Frederick Wilhelm University of Berlin conferred upon him "the immunities and privileges ornaments and honours of "Doctor of Medicine." The diploma was produced and there is no doubt that the magistrates considered that it was a diploma granted by a genuine university. It would be convenient here to say what the true implication is that attaches to the use of the expression "Doctor of Medicine" or its recognized abbreviation "M.D." The term "Doctor" is now commonly used to mean any medical practitioner, but when that word is used in conjunction with some particular branch of learning it means one who in any faculty has attained to the highest degree conferred by a university. We take this from the Oxford Dictionary. So a person who describes himself as a Doctor of Medicine represents that he has had this degree conferred upon him by a university as the result of competent examination. That there are bogus concerns masquerading as universities who sell bogus degrees may well be true and if the only title of a person who describes himself as a Doctor of Medicine is a piece of parchment and a hood which he has bought and paid for from some commercial concern the courts will know how to deal with such an imposture. It was further found that in January, 1940, the secretary of the Medical Defence Union had written to the respondent drawing his attention to the London Telephone Directory in which he was described as "Luftig, William, M.D. Berlin, Physn." The letter informed the respondent that the use by him of the title "Physician" was a direct infringement of the Medical Act and rendered him liable to penalties. The letter went on to say that "the case "of *Whitwell* v. *Shakesby* had decided that it was illegal for "any person to make use of the word 'Physician' associated "with any qualifications of any kind unless he be an individual "whose name appears on the Medical Register." Whether that is an altogether accurate description of the decision in the case referred to is one of the matters which we shall have to consider in the present case, but having received that letter the respondent answered it saying that he would take the necessary steps to see that the offending word "Physician" or its abbreviation did not appear again in the directory and it appears that thereafter he did not describe himself as a physician. The respondent is not registered under the Medical Act, 1858. The justices dismissed the informations and have stated their opinion in these terms: "We, being of the opinion "that the respondent had not wilfully and falsely used the "title of Doctor of Medicine held that the informations "alleging that offence should be dismissed, and We being "of the opinion that as the respondent had used the description "'M.D., BLN' and not 'M.D.' simply as stated in the "summons we held that the letters 'M.D., BLN' did not "imply that he was registered under the Medical Act, 1858." On an application being made to the justices to state a case they refused to state one but this court directed them to do so. They apparently considered that the application was frivolous and that their decision raised a question of fact alone. The justices may be surprised to know that on the case coming before the court it appeared to present features of such difficulty and importance that it was ordered to be re-argued before a full court. While not imputing any contumacy to the bench, their refusal to state a case when requested to do so is to be regretted as it has involved the parties in considerable extra expense.

Before considering the law applicable to the case, we think it well to emphasize that a Divisional Court of five judges has no greater powers than one of three or even two. This court is bound by its own decisions as is the Court of Appeal whatever the number of judges that may constitute it: see *Police Authority for Huddersfield* v. *Watson* (1). The principles of *Young* v. *Bristol Aeroplane Co., Ltd.* (2) apply equally to this court. It was there held that "The only "exceptions to this rule are: (1.) The court is entitled and "bound to decide which of two conflicting decisions of its "own it will follow. (2.) The court is bound to refuse to "follow a decision of its own which, though not expressly

---

(1) [1947] K. B. 842, 847. (2) [1944] K. B. 718.

1949

YOUNG-HUSBAND *v.* LUFTIG.

"overruled, cannot in its opinion, stand with a decision of the "House of Lords. (3.) The court is not bound to follow a "decision of its own if it is satisfied that the decision was "given per incuriam," that is to say, that a case or a statute has not been brought to the attention of the court and the decision has been given in ignorance or forgetfulness of the existence of that case.

The case most relied upon by the appellants here was *Jutson* v. *Barrow* (1), and it was because the court before which this case came in the first instance thought there were certain dicta in that case which might be in conflict with or go beyond certain earlier decisions which were apparently not cited that they directed a re-argument, and when re-argument is directed it is often desirable that it should take place before a full court.

We now turn to a consideration of the relevant Statutes. The Medical Act, 1858, is entitled "An Act to regulate the "Qualifications of Practitioners in Medicine and Surgery," and the preamble states that it is expedient that a person should be able to distinguish between qualified and unqualified practitioners. The Act then sets up a General Council and provides for the registration of medical practitioners. The schedule sets out the persons who are entitled to be registered and under that Act, Doctors of Medicine of a foreign university could only claim to be registered if they had been practising in the United Kingdom before October 1, 1858. By s. 34 it is provided that the words "legally qualified Medical "Practitioner" or "duly qualified Medical Practitioner" or any words importing a person recognized by law as a Medical Practitioner or member of the medical profession when used in any Act of Parliament shall be construed to mean a person registered under this Act. Section 40, which is the material section in this case, provides that "Any person who shall "wilfully and falsely pretend to be or take or use the name "or title of a Physician, Doctor of Medicine, Licentiate in "Medicine and Surgery, Bachelor of Medicine, Surgeon, "General Practitioner or Apothecary, or any name, title, "addition or description implying that he is registered under "this Act or that he is recognised by law as a Physician, or "Surgeon, or Licentiate in Medicine and Surgery, or a Practitioner in Medicine, or an Apothecary, shall, upon a summary "conviction for any such offence, pay a sum not exceeding

(1) [1936] 1 K. B. 236.

"Twenty Pounds." The qualifications for registration were extended by the Medical Act, 1886, which entitled a person holding a recognized foreign diploma granted in a foreign country to which the Act might be applied by Order in Council to be registered, but no question arises under this Act as it was never applied to Germany. Provision has been made by the Medical Practitioners and Pharmacists Act, 1947, enabling the Council to register certain foreign medical practitioners if they see fit, and subject to certain conditions, which it is unnecessary to set out as no application had been made under this Act by the respondent for registration.

The Medical Acts do not prohibit any person from practising medicine or surgery. The Act of 1858 confers certain privileges on registered persons, for instance that none but registered persons can recover their fees in a court of law or sign a certificate required to be signed by a medical practitioner. Unregistered persons are prohibited from holding appointments at hospitals, infirmaries or dispensaries which are not supported wholly by voluntary contributions, from which it is clear that an unregistered medical man may hold an appointment in a voluntary hospital. What is prohibited by the Act is the use of certain titles such as Physician, Doctor of Medicine and so forth which of themselves imply or are to be taken to imply that the person using them is registered, or any name, title, addition or description which would give rise to a similar implication. It is the opening words of this section that have given rise to much of the difficulty which surrounds the question. They are: "Any person who shall wilfully "and falsely pretend to be or take or use the name or title," etc., and it is certainly significant, as Mr. Evans for the respondent pointed out, that Acts dealing with other professions such as solicitors, veterinary surgeons and dentists do not contain the words "wilfully and falsely." Mr. Havers contended firstly that the title "Doctor of Medicine" could only be used by a person who was registered. If that be so, it would follow that it would be an offence for the Regius Professor of Medicine at one of our great universities who might not have taken steps to get himself registered, having no intention of practising but of leading an academic life, to describe himself as a Doctor of Medicine. If he wrote a treatise, he could not so describe himself, nor could a professor of international reputation, who came to this country and read a paper before various learned Medical Societies and afterwards published it, describe himself as an " M.D." though that degree had been conferred upon him by the University of Paris, Vienna, Harvard, or any other of the great teaching institutions of the world. An alternative submission by Mr. Havers was that the Act at least prevented a man from using the title unless he was qualified to be registered, but we can find no words in the statute which would support that contention. A man can only be registered if he possesses certain qualifications but if he uses a title which would imply that he is registered it appears to us that he would commit an offence if he in fact is not registered, however qualified he might be.

The first question that we have to decide is whether a person upon whom the degree of Doctor of Medicine has been conferred by a genuine and not a bogus university is entitled to describe himself as a Doctor of Medicine with or without some qualification which would indicate the origin of his doctorate, and would not imply that it was one which would qualify him for registration in this country, or whether, not being registered in this country, he is absolutely prohibited from so styling himself. In *Jutson* v. *Barrow* (1), the case most relied on by the appellant, Lord Hewart C.J. said, " the effect of this section " is to prohibit the use of any of these names and well-known " descriptions except in cases where they are lawfully employed. " If one of those well-known professional descriptions is " employed, I think a defendant cannot be heard to say that " the name which he employed did not imply that he was " registered or recognized in the sense described by the statute" By " recognized," his Lordship apparently meant " qualified." Humphreys J. in the same case said, " It appears to me that " the prohibition against the use of the named words and " titles or of any other titles having the same implication is " absolute." These are two of the passages which led the court when the case was first opened to think that a close examination of the authorities was necessary. Neither of the judgments to which reference has just been made deal with the words " wilfully and falsely," though Singleton J. did refer to those words in his judgment. The one matter which distinguishes *Jutson* v. *Barrow* (1) from this case is that the practitioner in that case was not only unregistered, but had no medical qualification or degree at all. We have had the advantage, through the industry of Mr. Evans, of being referred to several cases which were not apparently cited or at any rate considered by the court in *Jutson's* case (1), and it is necessary for the court to review them all for the purpose of deciding the present case.

---

(1) [1936] 1 K. B. 236, 243.

We now turn to the authorities and it would be convenient to take them in chronological order. The first case is *Ladd* v. *Gould* (1). In that case the defendant called himself a surgeon and mechanical dentist, and the court held that it was for the justices to decide as a question of fact and not of law whether by the use of the word "surgeon" coupled with the words "mechanical dentist" or such like titles was an offence against the statute. The magistrates dismissed the information and Cockburn C.J. said that he should have come to the same conclusion, but the important thing from the point of view of this case is that the Lord Chief Justice said: "I do not think "there was any falsehood, or any intention to deceive which "was necessary in order to bring the case within the Act. "That was also the opinion of the magistrates, though they "might have come to a different opinion." That was a case, it will be observed, which was heard within two years of the passing of the Act, and the court held that it was necessary there should be falsehood or the intention to deceive.

The next case was heard later in the same year in the Court of Exchequer, *Ellis* v. *Kelly* (2). The remarkable feature of this case is that it is also reported in 3 Law Times, page 331; in 6 Jurist Reports, New Series, page 1113, but the reports of Bramwell B.'s judgment in those two reports differ very materially from the report in Hurlstone & Norman, and from each other, and the report in 30 Law Journal, Magistrates' Cases, page 35 is also somewhat different. A perusal of those reports, however, enables the court to see the ratio decidendi, and it is that which is binding and not the expressions used. In that case the respondent was a Member of the Royal College of Surgeons and a Licentiate of the Society of Apothecaries. He was possessed of a German Medical diploma, and called himself "Dr. Kelly," and it was said that that was tantamount to using the title of Doctor of Medicine and so was an offence under the Act, as he was not registered as such. It is difficult to believe that in these days when, as we have already said, the term "Doctor" is commonly used to denote a medical practitioner, without regard to his particular qualifications, that there would be a prosecution in such circumstances, but the importance of the case is that it is clear that the reason why the court held that there was no offence was that, believing that he was entitled to use the title of Doctor, the justices were justified in finding that he had not done so wilfully and falsely. That is clear from Bramwell B.'s judgment whichever report is looked at, and Wilde B. said the only question was the meaning of the words "wilfully and falsely." He said the defendant had a German diploma which he might reasonably believe entitled him to describe himself as he did, and that it was a question for the magistrates whether he used the particular description knowing he was not entitled to it and with intent to deceive the public.

---

(1) (1860) 1 L. T. 325.

(2) 6 H. & N. 222.

Then comes *Andrews* v. *Styrap* (1). There a druggist added the letters "M.D." after his name in the bills that he sent in for professional attention and medicine. He was purporting to practice medicine and he claimed to describe himself as an M.D. on the ground that be had a diploma from an American University. He had never been in America nor undertaken any examination in order to obtain the diploma. The court upheld the conviction and obviously did so on the ground that this was a bogus degree. It was said there was ample evidence that the appellant acted wilfully for he did it on purpose and falsely because he pretended thereby to be on an equal footing with any regularly bred and registered physician or M.D. in England and must have known that his diploma was in fact utterly worthless and valueless as an indication of the possessor's merit.

In *Carpenter* v. *Hamilton* (2), the defendant kept a shop where he habitually dispensed medicine and gave advice. He exhibited in his window a diploma in which he was described as a Doctor of Medicine of the Metropolitan Medical College of New York in the United States of North America of the validity of which, beyond production, he gave no further proof. The magistrates dismissed the information holding the respondent did not wilfully and falsely pretend to use the name of Doctor of Medicine contrary to the section as he only represented himself to be and used the name of Doctor of Medicine of this New York College. The court upheld the dismissal, Cleasby B. saying, "how is it possible to make out a charge of falsely pretending to be something when the only evidence is that the man pretends to be what he really is?" To reconcile these two cases, we think that in the latter the justices must have considered that the college was a genuine and not a bogus concern.

(1) 26 L. T. 704.

(2) (1877) 37 L. T. 157.

Davies v. *Makuna* (1), is a case in which the section had to be considered in connexion with an action between the defendant, a duly qualified medical practitioner, who had agreed with the plaintiff who was not duly qualified, to serve the plaintiff as an assistant. Pearson J. in the course of his judgment said: " No doubt it is difficult to understand the " exact limit of s. 40 and I do not mean to say that I am " absolutely certain what is the proper construction of it. " But, looking at the preamble of the Act and at s. 32, I think " the meaning is, that in order to incur the penalty a person " must wilfully and falsely take or use one of the names of " titles therein mentioned in such a manner as is calculated " to deceive the public," and when that case went to the Court of Appeal, Cotton L.J. appears to have agreed with that construction.

In 1891 came *Reg.* v. *Aston Justices* (2). That case raised the question whether an L.S.A. qualified and registered as such was entitled to describe himself untruly as a Physician or M.D. He contended that he possessed a diploma from some institution in the State of Indiana, and so the court said he was an L.S.A. with an American degree. The court held that he was properly convicted, holding that the letters M.D. would imply that he was registered under the Act, and considered that he had used those letters wilfully and falsely.

In 1894 *Steel* v. *Ormsby* (3), was again a prosecution for unlawfully assuming the title of M.D. The defendant was a miner who had visited sick persons and supplied them with medicine. He signed death and other certificates, adding the letters " M.D." and " B.C." after his name and claimed to be entitled to do it by reason of a certificate granted by a Joint Stock Company called the General Council of Safe Medicine, Ltd., which purported to train and educate its members in medical botany and organic magnetism. The magistrates found that the defendant had wilfully and falsely taken the title of " M.D." thereby implying that he was registered. Wright J. in giving judgment said the section required a statement to be made by the defendant false in fact and known by him to be so and held that there was evidence that the man had falsely described himself as M.D. Collins J. concurred and said that some doubt raised by expressions of Bramwell B. in *Ellis* v. *Kelly* (1) had been removed by later cases. It was a question of fact. The defendant having signed certificates which can only lawfully be given by medical practitioners, describing himself as M.D., and having no diploma or degree but some certificate given by a bogus institution, there was evidence on which the magistrates could find as they did.

---

(1) (1885) 29 Ch. D. 596.

(2) (1891) 8 T. L. R. 123, sub nomine *R.* v. *Baker*, 56 J. P. 406.

(3) (1894) 10 T. L. R. 483.

The next case is *Reg.* v. *Lewis & Frickhart* (2) and *Reg.* v. *Lewis & Bridgwater* (2). These were rules calling upon the stipendiary at Cardiff to state a case, he having dismissed summonses against both the defendants for using the letters M.D. and he had refused on the ground that the applications were frivolous as he had dismissed the summonses on questions of fact only. Eliza Frickhart was an M.D. of Zurich University. Her name had been on the Medical Register, but had been removed therefrom for professional misconduct. The informant who was a retired medical man knew she was not registered when he consulted her, and the magistrate dismissed the information. In *Bridgwater's* case (2), the defendant described himself as "Dr. Bridgwater, M.D., "U.S.A.," and in the consulting room was hung up what purported to be a diploma of some American University. The magistrate dismissed the summons on the ground that there was no proof of a false pretence for the defendant merely held himself out to be what he was, an M.D. of some American university. The court discharged the rules in both cases. In *Frickhart's* case (2) Collins J. said, "there was no proof "before the magistrate of a false pretence." In *Bridgwater's* case (2) Grantham J. said that no case yet had gone so far as to decide that the use of M.D. with other letters constituted a holding out that the defendant was a registered M.D., and as the magistrate had negatived any false pretence there was no ground for granting the rule. Collins J., concurring, said "the learned magistrate has found that the defendant did not "in point of fact pretend that he had a registrable degree, and "if so, the magistrate would be perfectly right in the "conclusion at which he has arrived." He concluded his judgment by saying: "On the cases as they now stand there "is a complete fog. It is impossible to say whether this is "a question of law or of fact."

Hunter v. *Clare* (3), is a case in which an L.S.A. duly regis-

(1) 6 H. & N. 222.

(2) (1896) 60 J. P. 392.

(3) [1899] 1 Q. B. 635.

tered described himself as a physician and surgeon and was prosecuted for wilfully and falsely pretending to be and taking and using the name and title of physician contrary to the section. The court quashed the conviction and Channell J. having said that he thought, though not without doubt, that the word "physician" is used in s. 40 in a technical sense and that in that sense the appellant was not a physician, went on to say: "Then, did the appellant 'wilfully and falsely' "describe himself as a physician? On that point *Ellis* v. "*Kelly* (1) is a distinct authority." He said the difference between *Ellis* v. *Kelly* (1) and *Andrews* v. *Styrap* (2) was that in the former case there was a foreign qualification, but a genuine one, and in the latter only a bogus diploma, and he thought that the conviction should be quashed for, although the appellant incorrectly described himself as a physician, he did not do so "wilfully and falsely" upon the grounds explained by the court in *Ellis* v. *Kelly* (1). He concluded his judgment by saying: "The justices ask us two questions: "the first, 'Whether or not the appellant holding the title "'of L.S.A. and being registered as such is authorized to take "'and use the name and title of physician in the manner "'the appellant so used it,' we answer in the negative. To "the second, 'Whether on the facts stated we were right in "'finding that the appellant so described himself wilfully "'and falsely within the meaning of the section,' we say that "the justices were wrong and on that ground we quash the "conviction."

From these cases it will be seen that there is an unbroken line of authority from 1860 to 1899, supported in the later part of that period by judges of the eminence of R. S. Wright J., Henn Collins J. and Channell J., that to commit an offence the defendant must have acted wilfully and falsely and that it is for the magistrates to decide whether he has done so, and also that he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did. He must of course have a reasonable ground for his belief. A person who has passed no examination and has received no qualification from a genuine teaching body cannot adopt one of the titles mentioned in the section and be heard to say that he believed he had such skill as would entitle him so to describe himself. We can sum up this part of the case by saying that there must be mens rea and the presence or absence of

---

(1) 6 H. & N. 222.

(2) 26 L. T. 704.

1949

Young-husband v. Luftig.

that state of mind must be tested on ordinary principles and in the light of common sense. "Actus non facit reum, nisi "mens sit rea" is a cardinal doctrine of the criminal law. No doubt the legislature can create offences which consist solely in doing an act whatever the intention or state of mind of the actor may be. Common instances are provided by many of the offences created by the Defence Regulations. It was an offence, for instance, to be found within a prohibited area. It was no defence for a person found there to say that he did not know or even at the time had no means of knowing that his presence was prohibited. Overriding considerations of safety placed on citizens the duty of finding out whether a place was a prohibited area or not. Of late years the courts have been so accustomed to dealing with a host of offences created by regulations and orders independent of guilty intention that it is desirable to emphasize that such cases should be regarded as exceptions to the rule that a person cannot be convicted of a crime unless he has not only committed a forbidden act or default but also that a wrongful intention or blameworthy condition of mind can be imputed to him. *Whitwell* v. *Shakesby* (1), is not we think in any way in conflict with the decisions that we have quoted. The defendant there had described himself as an osteopathic physician and surgeon. He was an honorary member of the Incorporated Association of Osteopaths Limited and the holder of a certificate from that company, but there was no evidence as to what, if any, examination had to be passed in order to obtain the grant of a certificate. The magistrate had refused to convict on the ground that the respondent did not use the title falsely within the meaning of the Act. It seems to us that the decision of the court who allowed the appeal and found an offence proved turns on the point that the defendant knowing that he had no qualification as a physician or surgeon must be held to have used that description falsely. That case was much relied on by the court in *Jutson* v. *Barrow* (2). We are not expressing any doubt as to the correctness of the decision in the latter case because there again the defendant had no medical training, nor was there anything in the case to show that he could have believed that he was entitled to use the word "surgeon" though we are not in agreement with all the dicta used in the judgments.

We have now to apply the law so far as we can gather it from these many cases to the present. The respondent holds

(1) 147 L. T. 157.

(2) [1936] 1 K. B. 236.

1949

YOUNG-HUSBAND *v.* LUFTIG.

a genuine degree of Doctor of Medicine granted by a foreign university. There is no reason therefore why he should not use that title and the justices were amply justified in finding that he did not use it wilfully and falsely ; but he must not use that title so as to imply that he is registered in this country because in our opinion the section contemplates that the use of the words Doctor of Medicine, Physician, Surgeon or other titles specifically mentioned in the first part of the section carries the necessary implication that the title he is using is one of those mentioned in the schedule to the Act. If, therefore, the respondent described himself, as he at one time did, as " M.D., Berlin," we think it is clear on the authorities that he committed no offence and that he is entitled to use that description. He is describing himself there as what he is and the addition of the word " Berlin " shows that he is not claiming to be possessed of one of the degrees mentioned in the schedule and does not therefore represent that he is registered. The real difficulty in this case is that at Brighton he used the abbreviation " BLN," and he did so on his own admission for the purpose apparently of concealing the fact or at any rate of diverting attention from the fact that his degree was obtained in Germany. The cases, however, oblige us to hold that it is for the magistrates to consider whether in so doing he has acted wilfully and falsely and we must take it that they have held he did not, and they have further held that " M.D., BLN " does not imply that he was registered. They might have decided the latter point the other way and it is to be hoped that the respondent will not in future use that abbreviation ; he may well incur penalties if he does so.

For the reasons given we think that on this point we are bound by the findings of the magistrates and as we cannot say there was no evidence upon which they could find as they did, it follows that the appeal must be dismissed. In conclusion, we may express our concurrence with what Collins J. said in *Bridgwater's* case (1) that the cases are in a complete fog. We hope that this review may tend to some extent towards dissipating it, and we venture to think that the time has come when the position might be clarified by further legislation.

Appeal dismissed.

Solicitors for the appellant : *Hempsons.*

Solicitors for the respondent : *D. Edgar Rodwell & Co.*

---

(1) 60 J. P. 392.

Considered. BLACKMILL, LD. *v.* STRAKER [1950] 1 K. B. 346

C. A.

1949
May 5.

Lord Greene M.R., Asquith and Denning L.JJ.

ROSE *v.* HURST.

Landlord and tenant—Lease—Trade carried on on controlled premises—Application for new lease in place of compensation for goodwill—Term and rent to be fixed by tribunal under the Landlord and Tenant Act, 1927*—Claim for standard rent under Rent Restriction Acts—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 5, *sub-ss.* 1 *and* 2.

The tenant of premises under a lease of twenty-one years ending in March, 1949, who had for several years carried on there a greengrocer's shop and lived overhead could have stayed on as a statutory tenant under the Rent Restriction Acts at the standard rent of 90*l.* a year. Instead he elected to apply for a new lease under the Landlord and Tenant Act, 1927, s. 5. The landlords admitted that goodwill had attached to the premises and expressed their willingness to grant a new lease at such rent and for such term not exceeding fourteen years as the tribunal should consider reasonable. The county court judge made an order for a new tenancy for the term of fourteen years at a yearly rent of 230*l.* On appeal the tenant claimed that the new lease could not be granted at a rent higher than the statutory rent.

Held, that on the true construction of the proviso to s. 5, sub-s. 2, of the Landlord and Tenant Act, 1927, which provided that the rent of the new lease should be " such rent as the tribunal may " determine to be the rent which a willing lessee, other than the " tenant, would agree to give and a willing lessor would agree to " accept," the Rent Restriction Acts could not apply so as to compel the tribunal to fix no rent greater than the standard rent.

This was so even in a case like this particular case where the premises only became controlled premises under a Rent Restriction Act later in date than the Landlord and Tenant Act, 1927.

APPEAL from Uxbridge county court.

By a lease dated April 28, 1928, premises consisting of a shop with dwelling accommodation over it and being 121, The Broadway, Southall, were let for the term of twenty-one years from March 25, 1928, at the yearly rent of 90*l.* The applicant, Daniel Nathan Rose, became the tenant of the premises under an assignment dated May 6, 1938, and then carried on a greengrocer's shop and lived over the shop. Although the tenant could have stayed on after the expiry of the lease as a statutory tenant under the Rent Restriction Acts at the standard rent of 90*l.* a year, he became desirous of obtaining a new lease and applied on June 16, 1948, under s. 5 of the Landlord and Tenant Act, 1927, for a new lease to be granted to him in lieu of compensation for goodwill attaching to the premises which he estimated at 3,000*l.* The landlords who were the executors and trustees of Augustus Hurst put in an answer by which they admitted that goodwill had attached to the premises by virtue of the business of a greengrocer and expressed their willingness to grant a new lease to the applicant at such rent and for such term not exceeding fourteen years as the tribunal should consider reasonable.

The matter having been referred to a referee he reported to the county court that the parties had settled that a lease for seven years was to be given to the applicant at a rent of 230*l.* without prejudice to the question as to the rent payable having regard to the fact that the standard rent of the premises was 90*l.* a year. The county court judge said that under the proviso to s. 5, sub-s. 2, of the Landlord and Tenant Act, 1927 (1), the tribunal was to fix the rent which a willing lessee would agree to give and a willing lessor agree to accept. If the legislature had intended the section to be read subject to the Rent Restriction Acts it would have so provided and it would be inequitable that the tenant should have the benefit of both Acts. The rent of 230*l.* must stand, but the term of years be extended to fourteen years in view of the substantial increase of rent. The applicant appealed.

Norman Stogden for the applicant. The question is whether on the grant of a new lease under s. 5 of the Landlord and Tenant Act, 1927, the rent payable can in the case of controlled premises be fixed at any higher rent than the standard rent. This point has been raised before but a decision avoided by the offer of the tenant to the landlord of a premium with the rent remaining at the standard rent, or when the premises in question consist of a shop with living rooms over, by the splitting of the lease into two leases and putting a high rent on the shop premises. The latter is an inconvenient course and the former course impossible, as the landlords are trustees, without an order of the court. There might really be two questions here because if it is found that the standard rent is payable the landlords would no longer agree to a term of fourteen years. On the question of the standard rent applying, the point put against the applicant is that he cannot have the best of both the Landlord and Tenant Act and the Rent Restriction Acts. The test in deciding the rent is the status of the premises and if the status is within the Rent Restriction Acts the rent must be as there laid down. The first authority relied on is *Carter* v. *S. U. Carburetter Co.* (1), as showing that it is the status of the house that is the vital consideration and that the right to have a standard rent is a right in rem: see also *Griffiths* v. *Davies* (2) and *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* (3).

---

(1) Landlord and Tenant Act, 1927, s. 5, sub-s. 2, provides in the proviso: "Provided that the rent "fixed by the tribunal as the rent "payable under the new tenancy "shall be such rent as the tribunal "may determine to be the rent "which a willing lessee, other than "the tenant, would agree to give "and a willing lessor would agree "to accept for the premises, having "regard to the terms of the "tenancy, but irrespective of any "goodwill which may have "become attached to the premises "by reason of the tenant or his "predecessors in title having "carried on thereat a particular "trade or business."

It follows that unless the Rent Restriction Acts are to be treated as overruled pro tanto by s. 5 of the Landlord and Tenant Act the new lease to be granted must be at the standard rent. Some light is thrown on this by the fact that in s. 16 of the Act of 1927 reference is made to the standard rent and power given in special circumstances to raise it, while there is no such proviso in s. 5. The difficulty that arises is that in the proviso to s. 5, sub-s. 2, such rent is to be fixed as would be agreed by a willing tenant and a willing landlord. In the case of standard rent the tenant would of course be willing and the landlord in the sense only that it would be illegal to charge a higher rent. There is no direct authority on the matter. In *Bishop of Gloucester* v. *Cunnington* (4), parsonages were held to be excepted from any application of the Rent Restriction Acts because of the obligation cast on the incumbents to live in them; and in *Shelley* v. *London County Council* (5) it was held that the local authority was entitled to put an end to tenancies of houses erected for the housing of the working classes under the Housing Act, 1936, and that to this extent the Rent Restriction Acts did not apply. The way in which these cases can be distinguished is that in each case a particular class of house was excepted from the application of the Rent Restriction Acts.

[Lord Greene M.R. In the present case is the house not one of a class of house where the tenant has a claim for compensation for goodwill?]

But the granting of a new lease only arises by the choice of the tenant.

---

(1) [1942] 2 K. B. 288.
(2) [1943] K. B. 618.
(3) [1947] A. C. 209.
(4) [1943] K. B. 101.
(5) [1948] 1 K. B. 274; [1949] A. C. 56.

Astell Burt for the respondents was not called upon.

Lord Greene M.R. I will ask Denning L.J. to give the first judgment of the court.

Denning L.J. The question in this appeal is whether a tribunal which awards a new lease under the Landlord and Tenant Act, 1927, can fix a rent in excess of the standard rent. In 1928 a dwelling-house and shop were let for a term of twenty-one years, which expired in March, 1949. The rent was 90*l.* a year and the premises were protected by the Rent Restriction Acts. The standard rent, therefore, was 90*l.* a year. In due course, in accordance with the Landlord and Tenant Act, 1927, the tenant served a notice claiming a new lease and brought proceedings for a new lease. The landlord did not dispute that goodwill had become attached to the premises and he said he was willing and able to grant a renewal of the lease of the premises at such rent and for such term not exceeding fourteen years as the tribunal should consider reasonable. That issue was referred to a referee and eventually came before the county court judge. He determined that the new lease should be for a term of fourteen years and that the rent should be 230*l.* a year. That sum of 230*l.* was the rent which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises.

The question is whether it was open to the judge to fix the sum of 230*l.* a year having regard to the fact that the standard rent of the premises was 90*l.* a year. It is said that it was impossible for him to do so because of the Rent Restriction Acts. A new lease has, of course, very considerable advantages over a statutory tenancy. A statutory tenant has only a personal privilege. He cannot assign the premises to any buyer, nor indeed has he complete security of tenure. But under the Landlord and Tenant Act if the tenant gets a new lease, he gets security for the term of the lease, and he has a valuable asset of which he can dispose by assignment to a purchaser. Nevertheless, it is said that the rent payable for the new lease is limited to the standard rent. The matter depends on the two statutes. On the one hand, s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, says that the rent of any dwelling-house to which the Act applies is limited to the standard rent, and any increase above it is irrecoverable. That applies not only to the original tenancy but also to any subsequent tenancy; and it applies notwithstanding any agreement which may be made between the parties, or, indeed, any judgment which may be entered as between them. So that is a perfectly general provision. On the other hand, s. 5, sub-s. 2, of the Landlord and Tenant Act, 1927, says that when a new lease is granted under the Act, "the rent fixed by the tribunal as the rent payable "under the new tenancy shall be such rent as the tribunal "may determine to be the rent which a willing lessee, other "than the tenant, would agree to give and a willing lessor "would agree to accept for the premises, having regard to "the terms of the tenancy, but irrespective of any goodwill "which may have become attached to the premises by reason "of the tenant or the predecessors in title having carried on "thereat a particular trade or business." It seems to me that those two sections cannot possibly apply at one and the same time to the self-same premises. Under the Landlord and Tenant Act a tribunal has to "determine" what the rent is to be. But if it has already been fixed by the Rent Restriction Acts, there is nothing for the tribunal to determine. Again under the Landlord and Tenant Act the rent is to be that which a "willing" lessee would agree to give and a "willing" lessor would agree to accept. But if the Rent Acts apply, the rent is fixed without regard to what either is "willing" to do. So the two provisions are inconsistent one with the other. The task of this court is to say, in the circumstances, which provision is to prevail.

The Act of 1927 is later and more specific than the Act of 1920 and must, I think, be taken to prevail. The provisions of the Act of 1927 which I have read must therefore be read in this way: "Notwithstanding the provisions of the Rent "Restriction Act, the rent fixed by the tribunal shall be "such rent as the tribunal may determine to be the rent which "a willing lessee, other than the tenant, would agree to give "and a willing lessor would agree to accept." In other words, it must be read as if it opened with the words: "Notwithstanding the provisions of the Rent Restriction "Act." If that is right, it is plain that the rent to be fixed under the provisions of the Act of 1927 is not affected by the provisions as to the standard rent in the Act of 1920. But the second question arises from the fact that this house was not controlled by the Act of 1920 but by the Rent Act of 1939, and when that Act was passed, there was nothing said about the Landlord and Tenant Act, 1927. But if my interpretation of the Act of 1927 is correct, it follows that it is not affected by the Act of 1939. The latter Act was a general Act referring to all premises below a certain value. In comparison with it, the Landlord and Tenant Act, 1927, was a specific Act. On my interpretation the relevant provisions of the Act of 1927 opened with the words: "Notwithstanding anything "in the Rent Restriction Act, the rent shall be." On that construction, the Acts run together, and the rent is not limited to the standard rent. The result is that the tenant gets his new lease at the rent of 230*l.* a year. In return he has the benefit of a fourteen years' lease which he can assign, and any assignee in his turn will be bound to pay the 230*l.* a year.

The truth is that in these cases the tenant must elect between two inconsistent rights. He must elect either to remain on as a statutory tenant at the standard rent, or to take a new lease at a rent fixed as between a willing lessor and a willing lessee. He cannot have the benefit both of the new lease and of the standard rent. In this case he has elected to take a new lease and must pay the rent of 230*l.* For these reasons, I am of opinion that the county court judge came to a correct conclusion and the appeal should be dismissed.

ASQUITH L.J. I agree.

LORD GREENE M.R. I agree and only wish to add a sentence or two.

The Landlord and Tenant Act, 1927, leaves it to the tribunal to decide what the proper terms of a tenancy should be in the matter of rent, duration and other terms. On the face of the statute, the power of the tribunal to fix those various matters is only limited by express words used in the relevant parts of the Act. If the argument addressed to us by the appellant is to be accepted, the result will be that in addition to the qualifications of a very limited nature expressly imposed by the Landlord and Tenant Act when those matters have to be considered, there must also be applicable a restriction confining and restricting the ambit of the tribunal's powers. The only way in which such a restriction can be got into the Act of 1927 is by reading it as being made subject to the limitation imposed under the Rent Restriction Act

C. A.
1949
ROSE v. HURST.
Lord Greene M.R.

in respect of premises falling within that Act. Looking at it as a mere matter of construction and having regard also to the entire difference of approach and the difference in the relevant subject-matters, it appears to me that any such construction as the appellant contends for would lead to a most extravagant result. The reason I say "difference "in the relevant subject-matters," is that the Landlord and Tenant Act is dealing, not with the personal right of occupation in relation to which a restricted rent under the Rent Restriction Act is payable, but with a totally different form of right, namely, the grant of an estate under a new lease. It would be an extraordinary result if the powers expressed in the widest terms in the Act of 1927 to do justice between the parties were to be limited by the provisions of an Act the whole theory and basis of which is statutory tenancy, as it is inaccurately called, or statutory right of occupancy, as I prefer to call it. On that basis, it seems to me that the Act of 1927 must be construed as overriding the provisions of the Rent Restriction Act. I have nothing to add to what my brother has said with regard to the effects on the Act of 1927 as so construed of the later Rent Restriction Acts.

In my opinion, the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Lawrence Dennis & Co.; Stilgoes.*

H. C. G.

1949
Mar. 29, 30, 31;
Apr. 1;
May 19.
Devlin J.

RIDER v. METROPOLITAN WATER BOARD

Metropolitan Water Board—Opening of highway to repair stopcock—Temporary reinstatement by board—Notice to highway that permanent reinstatement necessary—Reinstatement negligently carried out by authority—Accident to plaintiff—Claim against Water Board—Reinstatement in part only undertaken by highway authority—Board released from liability—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 32—*Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 114.

By s. 32 of the Water Works Clauses Act, 1847 (which is incorporated with the private Act of the Metropolitan Water Board) "where the undertakers open or break up the road or "pavement of any street they shall . . . . fill in the ground, "and reinstate and make good the road or pavement, ... and "shall . . . . keep the same in good repair . . . ." for a specified period.

By s. 114 of the Metropolis Management Act, 1855, a local authority may "fill in the ground and make good the pavement . . . . instead of permitting such work to be done by the "company or person by whom such surface is broken up or "opened . . . ." It was held in *Cressy* v. *South Metropolitan Gas Company* (1906) 94 L. T. 790, that the obligations imposed on the undertakers by s. 32 of the Waterworks Clauses Act, 1847, must, since the coming into force of s. 114 of the Metropolis Management Act, 1855, be read as being subject to the proviso "unless the local authority step in and do the work." The Metropolitan Water Board having excavated a hole in the highway for the purpose of repairing a stop-cock, filled in the hole and the work of the permanent reinstatement of the pavement was then undertaken and completed by the local authority. Some two years later, the plaintiff tripped over the stop-cock box which, was standing above the level of the surrounding pavement. The plaintiff brought an action against the board and it was found that the surface of the highway had disintegrated owing to the negligent reinstatement of the pavement by the local authority. It was contended for the plaintiff that the board were none the less responsible since s. 114 only operated to excuse them from liability if the joint work of filling in the ground and making good the pavement were both performed by the local authority.

Held, that the filling in and reinstating or making good contemplated by both s. 32 and s. 114 were two separate operations and there was no reason why the implied proviso to s. 32 should not apply to the second operation of reinstating actually performed by the local authority so as to exonerate the board from any liability under s. 32.

ACTION.

On July 8, 1944, the Metropolitan Water Board, by a firm of contractors employed by them, executed some repairs to a stop-cock situated outside the plaintiff's house, 16, Montserrat Road, Putney. For the purpose of doing the necessary work, they made an opening in the highway approximately two feet square and twenty inches deep. The contractors removed the stop-cock box, repaired the stop-cock, filled in and consolidated the excavated ground and temporarily reinstated the surface of the highway. On July 10, 1944, pursuant to s. 30 of the Waterworks Clauses Act, 1847 (which Act is incorporated with the Special Act applicable to the board), the board sent to the Wandsworth Borough Council, the appropriate highway authority, a reinstatement voucher, notifying the council of the opening of the highway and stating that an immediate reinstatement was required. On August 15, 1944, the council carried out the work of renewing the surface of the pavement. The temporary surface of gravel which had been placed there by the board was removed, the earth below was pounded and a tar bottom laid on it. A topping of finer material was superimposed and the surface was finished so that it was level with the top of the stop-cock box lid. On October 16, 1934, a resolution had been passed by the council that until further order the reinstatement of highways broken up or opened by statutory undertakers or public authorities having rights to open highways, should be carried out by the council under the powers conferred on them by the Metropolis Management Act, 1855. On December 29, 1946, at about 5.30 p.m., the plaintiff, R. Rider, was returning to his house, the evening being very foggy, when he tripped over the lid of the stop-cock box, which projected from one-half to seven-eighths of an inch above the surrounding pavement. The plaintiff sustained injuries and brought the present action against the board. By his statement of claim he alleged that the defendants had negligently failed to fill in the excavation with sufficient material and to pummel sufficiently such material as was used in filling in the excavation with the result that the surface of the highway had subsided and had thus increased the projection of the stop-cock box cover. By their amended defence the defendants pleaded that after the work on the stop-cock had been completed and the surface of the highway temporarily reinstated, the highway authority in the exercise of their powers in that behalf contained in s. 114 of the Metropolis Management Act, 1855, permanently reinstated the pavement round the stop-cock, and the pavement was thereafter in a satisfactory condition and flush with the top of the stop-cock box and its cover. The defendants further or alternatively pleaded that if the surface of the highway subsided at any time after the permanent reinstatement had been made, they were under no liability in respect thereof. They also alleged that the plaintiff had been guilty of contributory negligence and that the maxim volenti non fit injuria applied.

DEVLIN J. held on the facts that there had been no negligence on the part of the defendants' contractors in the work of repair and temporary reinstatement done by them, but that there had been negligence on the part of the highway authority in the carrying out of the permanent reinstatement with the result that the pavement round the stop-cock box disintegrated and the lid of the stop-cock box was exposed in such a manner as to render it a danger on the highway.

Humfrey Edmunds for the plaintiff. The plaintiff is entitled to recover damages from the board on the ground of negligence. Even if there was no negligence in the first instance on the part of the contractors employed by the board and the accident was due to the negligence of the council when they permanently reinstated the pavement, the board would still be liable by virtue of their obligations under s. 32 of the Waterworks Clauses Act, 1847 (1). The reinstatement work carried out by the council was not done in pursuance of their powers under s. 114 of the Metropolis Management Act, 1855 (2), but as contractors on behalf of the board. The reinstatement voucher served by the board on the council was a request to them to do the work and the council's compliance with that request constituted a contract with the board to do the work on their behalf, with the result that if there was any negligence in doing the work the board would be responsible.

Roy Wilson and *J. Wilcox* for the defendants. With regard to the contention that the work done by the borough council

---

(1) Waterworks Clauses Act, 1847, s. 32: "When the under-"takers open or break up the road "or pavement of any street . . . . "they shall with all convenient "speed complete the work for "which the same shall be broken "up, and fill in the ground, and "reinstate and make good the "road or pavement, ... and "shall, after replacing and making "good the road or pavement ". . . . keep the same in good "repair for three months there-"after, and such further time, "if any, not being more than "twelve months in the whole, as "the soil so broken up shall "continue to subside."

(2) Metropolis Management Act, 1855, s. 114: "Provided "also, that whenever the per-"manent surface or soil of any "street is broken up or opened, "it shall be lawful for the vestry "or district board of the parish "or district in which the same "is situate, in case they think "it expedient so to do, to fill "in the ground and make good "the pavement or surface or "soil so broken up or opened, "and to carry away the rubbish "occasioned thereby, instead of "permitting such work to be done "by the company or person by "whom such surface is broken "up or opened; and the expenses "of filling in such ground and "of making good the pavement "or soil so broken up or opened "shall be repaid, on demand, to "the vestry or board by such "company or person."

1949

RIDER
v.
METROPOLITAN
WATER
BOARD.

was done in pursuance of a contract between the council and the board, there is no evidence that even before the resolution of the council on October 16, 1934, that all reinstatements would be made by them in the exercise of their statutory powers under s. 114, reinstatements had been carried out on a contractual basis. From the date of the resolution, there can be no doubt on the point. The contention that the reinstatement voucher sent to the council amounted to a request to them to do the work on the board's behalf cannot be supported. The board, knowing of the resolution that had been passed, could do nothing else than serve a reinstatement voucher. Since the council were clearly acting in pursuance of their powers under s. 114, it follows that if there had been at any time negligence in the reinstatement of any part of the pavement removed, that would not be negligence for which the board would be responsible. It was decided in *Cressy* v. *South Metropolitan Gas Co.* (1) that the obligations of the gas company to reinstate under s. 10 of the Gas Works Clauses Act, 1847 (which is identical in its terms with s. 32 of the Waterworks Clauses Act, 1847) must, since the coming into force of s. 114 of the Metropolis Management Act, 1855, be read as being subject to the implied proviso, "unless the "local authority step in and do the work." In *Brame* v. *Commercial Gas Co.* (2) it was laid down that to effect the release of the undertaker from his obligation to reinstate, it was necessary that the local authority should actually take charge of the work. In the present case, the borough council stepped in and carried out the work of reinstatement and the board was, therefore, relieved of all its obligations under s. 32 of the Act of 1847.

Humfrey Edmunds in reply. The provisions of s. 114 only operate to relieve the board of its obligations under s. 32, if the whole of the work is done by the council. The words "such work" in the phrase "instead of permitting such work" in s. 114 refer to the joint work of filling in the ground and making good the pavement and unless both of those operations are performed by the council s. 114 does not apply. The phrase "instead of permitting" indicates that there is a power in the local authority to prevent. In this case the council did not prevent the board from performing the first operation of filling in the ground, so that they were only prevented from doing a part of the work. As the whole of the work was not done by the council, s. 114 does not protect the board from liability.

---

(1) (1906) 94 L. T. 790.

(2) [1914] 3 K. B. 1181.

1949

RIDER
v.
METROPOLITAN
WATER
BOARD.

Cur. adv. vult.

May 19. DEVLIN J. read the following judgment: On July 8, 1944, the defendants executed some alterations or repairs to a stop-cock box outside the plaintiff's house, No. 16, Montserrat Road, Putney. For this purpose they broke the tarred surface of the pavement around the box and excavated a hole two feet square by eighteen inches deep. After completion of the work of repair the hole was refilled and consolidated by pounding and the surface was made good temporarily by laying gravel to a depth of four inches, it being intended to leave the renewal of the paving to the Wandsworth Borough Council, who are the appropriate highway authority. The work was actually done by a firm of contractors, J. B. Edwards & Co., Ld., employed by the board, but it was supervised by two servants of the board.

Three days later, on July 10, 1944, the board sent a notice to the Wandsworth Borough Council informing them that the surface of the public way had been disturbed and that it required immediate reinstating. In opening and breaking up the highway the board were acting under powers contained in the Waterworks Clauses Act, 1847, an Act which it is agreed is incorporated in the Special Act applicable to the board. In serving the notice to which I have referred the board were, at any rate as to the first part which gives notice of the fact of disturbance, acting under s. 30 of the Act. This section ordinarily requires the board to give notice of opening or breaking-up not less than three days before they begin the work. But it also provides that in cases of emergency the notice may be given as soon as possible after the beginning of the work. This was apparently treated both by the board and by the council as a case of emergency, a term which was rather loosely interpreted in the conditions of 1944. As to the part of the notice which says that immediate reinstatement is required, this has been the subject of a dispute which I shall deal with hereafter.

On August 15, 1944, the council did the work of renewing the surface. The temporary surface of gravel was removed. The earth below was pounded and on it a tar bottom was laid, about two and a-half to three inches thick. Then a topping of finer material was laid; this was about one-half an inch thick and it was finished so that it was level with the top of the box lid.

Between two and two and a-half years later at about 5.30 p.m. on December 29, 1946, the plaintiff, returning to his house on a very foggy night, tripped over the lid of the box and sustained injuries as a result of which he has brought this action.

An inspection of the pavement made shortly after the accident showed that almost the whole of the topping had disappeared and that the lid projected from one-half an inch to seven-eighths of an inch above the surrounding pavement. The projection of seven-eighths of an inch was on the side from which the plaintiff approached at the time of the accident. I am satisfied that in this condition the lid constituted a danger on the highway. This was the view expressed at the time by the defendants' foreman and by the council's inspector, and I see no reason to differ from it.

The action is brought in negligence, as it must be, because the work was done pursuant to statutory authority. The complaint is in effect that the board neglected the duty imposed on them by s. 32 of the Act of 1847 of making good the pavement which they had broken up. Counsel for the board has admitted that the defendants are liable for the negligence, if any, of their contractors; and has also admitted, subject to a defence based on the Metropolis Management Act, 1855, s. 114, that the board is liable for the negligence, if any, of the council. Before me the plaintiff has contended that the work was done negligently in two respects.

In the first place it is said that the soil filled in by the board's contractors was not properly consolidated with the result that by 1946 it had subsided; and that this subsidence was, at any rate, one of the causes of the exposure of the box lid.

[His Lordship reviewed the facts in relation to this allegation and found that there was no direct evidence that the work of filling in had been negligently carried out and that there had been no subsidence from which negligence could be inferred. He continued :]

The second head of negligence relied on is the failure to lay the topping properly with the result that by 1946 it had disintegrated. Here again the direct evidence is that it was properly laid, but here there is no doubt about the fact of disintegration. The case for the plaintiff is that from that fact I must infer that it was negligently laid.

[On this allegation of negligence, his Lordship said that no other cause for the disintegration of the topping could be suggested except negligence in the laying of it. He found that the work had been done negligently, and, that as the result of such negligence, the lid of the stop-cock box was exposed in such a manner as to render it a danger on the highway. The judgment continued :]

Before I consider the defence under the Act of 1855, to which I have already referred, I shall dispose of two other minor defences. The first is an allegation of contributory negligence and of volenti non fit injuria. I think it is settled that the latter principle does not apply in a case of obstruction on the highway such as this : the authorities are collected in Clerk & Lindsell on Torts, 10th ed., page 58. As to contributory negligence I am not satisfied that the plaintiff was guilty of contributory negligence on this occasion.

The second defence is that the defendants' duty under s. 32 is not to make a permanent repair but to make good and keep in good repair for three months, and that the disintegration of the topping does not amount to a breach of this obligation. I need not inquire whether the topping disintegrated before the expiry of three months, because I think that the inference I should draw from the evidence is that the topping was never properly laid at all and accordingly that there was a breach of the obligation to make good. On this point I follow the reasoning in *Withington* v. *Bolton Borough Council* (1).

I turn now to the defence under s. 114 of the Metropolis Management Act, 1855. This section empowers the council in a case of this sort to do the work themselves, and, to use the words of the section so far as they are material, " in case they " think it expedient so to do, to fill in the ground and to make " good the pavement . . . . instead of permitting such work " to be done by the company or person by whom such surface " or soil is broken up or opened ; and the expenses of filling " in such ground, and of making good the pavement or soil " so broken up or opened, shall be repaid . . . . by such " company or person." The board contends that the council was, in August, 1944, acting under this power ; and therefore that, on the authority of *Cressy* v. *South Metropolitan Gas Company* (2) and *Brame* v. *Commercial Gas Company* (3), the board is absolved from all liability under s. 32 in respect of all the work done to the soil and pavement around the stop-cock.

---

(1) [1937] 3 All E. R. 108.
(2) 94 L. T. 790.
(3) [1914] 3 K. B. 1181.

I regard the reasoning of these two decisions in the Divisional Court as binding on me; and I think this reasoning establishes that the obligation under s. 32 is qualified by s. 114 and is to be read as if it were subject to the proviso "unless the local "authority step in and do the work." *Brame* v. *Commercial Gas Company* (1) makes it clear that this proviso is not satisfied unless and until the work is actually taken over by the council.

Counsel for the plaintiff makes two answers to this defence. The first is that the council was not in fact acting under s. 114 at all. The notice of July 10 informed the council that the pavement required immediate reinstating. This, it is argued, was an invitation to the council to do the work at the expense of the board; the invitation was accepted by conduct; and as a result an ordinary contract came into being. I find that work of this sort has been done by the council for many years past. There is some evidence that in 1913 and 1914 it was being done under contract. But in 1933 and 1934 upon the question being raised by the board, the town clerk replied that the practice adopted by the council with regard to reinstatement of trenches was in pursuance of s. 114. The board raised the point that this practice ought to be sanctioned by a resolution of the council, and, consequently, on October 16, 1934, the council resolved that until further order the reinstatement of highways broken up or opened by statutory undertakers or public authorities having rights to open highways be carried out by the council in pursuance of the powers contained in s. 114. I cannot doubt that this resolution was communicated to the board; and I think it shows that at least from that time onwards there was no intention on the part of either side to make any contract for the execution of work of this type. There was in force at the material time a schedule of charges agreed between the parties for work done by the council. But this is not inconsistent with the work being done under s. 114, for it is not unnatural that when the section was so frequently in operation the parties should agree upon the amount of the expenses which could be recovered by the council thereunder. I hold that this answer is bad.

Since the only negligence I have found lies in the laying of the topping, and since that work was actually done by the council, it would appear to follow that the board is exonerated. But Mr. Edmunds contends, and this is his second answer to the defence based on the section, that s. 114 applies to relieve the board only if the whole of the work is done by the council. In the phrase "instead of permitting such work" the words "such work," he says, refer to the joint work of filling in the ground and making good the pavement; and the words "instead of permitting" imply a power to prevent. The council did not fill in the ground and so the board was not prevented from doing the whole of the work, but only a part of it.

---

(1) [1914] 3 K. B. 1181.

I accept the view that the filling in was done by the board's contractors and that it was done not, as was argued on behalf of the defendants, as a temporary measure for which the council must ultimately assume responsibility, but as permanent work. The evidence shows that the council were concerned only with the reinstatement of the surface. They were not, in the notice of July 10, informed of the depth of the excavation. Their work consisted of removing the temporary surface of the gravel and beneath it they expected to find a firm base on which to lay their permanent surface. The responsibility for creating that firm base belonged to the board. The pounding which the employees of the council did was intended primarily to make good any disturbance to the base caused by the work of removing the gravel.

There were, in practice, two separate operations, one of filling in the excavation and the other of reinstating or making good the tar pavement; they are not unified merely by reason of the fact that one is built upon the other. Section 114 refers in its natural and ordinary construction to these two operations separately, and so does s. 32. I see no reason why the implied proviso in s. 32 should not apply to the second operation which the council actually did. Accordingly, I hold that this defence succeeds.

There will be judgment for the defendants.

Judgment for defendants.

Solicitors for the plaintiff: *Hewitt, Woollacott & Chown.*
Solicitors for the defendants: *H. R. McDowell.*

P. B. D.

Applied. JONES *v.* WHITEHILL [1950] 2 K. B. 204
Considered. GAMMANS *v.* EKINS [1950] 2 K. B. 328

Applied. LANGDON *v.* HORTON [1951] 1 K. B. 666

Dictum of COHEN, L.J., at p. 395, *applied.* JONES *v.* WHITEHILL. [1950] 1 All E.R. 71.

Applied. GAMMANS *v.* EKINS. [1950] 2 All E.R. 140.

C. A.

BROCK AND OTHERS *v.* WOLLAMS.

1949
Mar. 16.

Bucknill,
Cohen and
Denning L.JJ.

Landlord and tenant—Rent restriction—" Tenant "—Death of tenant holding a statutory tenancy and leaving no widow—Member of tenant's " family," residing with him at and for six months before tenant's death—" Adopted " child having lived for nearly forty years with adopter—No legal adoption—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 13.

W., when a child of five or six years of age was adopted, in fact, by L. in 1912 and had resided with him until his death in 1948, except for about three years after her marriage in 1939. After her husband's death in 1942, W. returned to live with L., her adopter, and had been residing with him for at least six months before he died. W. was not adopted under the provisions of the Adoption of Children Act, 1926.

Held that, assuming L. was a statutory tenant under the Rent Restriction Acts at the time of his death, W., his adopted daughter, was a member of L.'s family residing with him at the time of his death within the meaning of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Per Denning L.J.: Members of the tenant's family within the meaning of the sub-section would include step-children and illegitimate children as well as adopted children, whether adopted in due form of law or not.

APPEAL from Uxbridge county court.

Mrs. Wollams, the defendant, when a child of five or six years of age was adopted by a Mr. Lofty in 1912 and went to live with him at 62 Park Lane, Harefield, Middlesex, of which house Mr. Lofty was tenant. She remained living at the house until 1939 when she married and left the house to live with her husband. There had been no legal adoption. In 1942 her husband died and subsequently the defendant returned to live with her adoptive father and she had been living with him for not less than six months before his death in February, 1948. Notice to quit the house was duly given, but the defendant claimed the protection of the Rent Restriction Acts on the ground that Mr. Lofty had died and left no widow, and that she was a member of the tenant's family within the meaning of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). The

---

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*g*) as amended by s. 1 of the Increase of Rent

C. A.
1949

BROCK
v.
WOLLAMS.

plaintiffs were the trustees of the deceased landlord's estate and they claimed possession of the house. Two questions were in issue: (*a*) whether Mr. Lofty was a contractual or a statutory tenant, since, if he was a contractual tenant s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 had no application: *Thynne* v. *Salmon* (1); and (*b*) whether the defendant was a member of Mr. Lofty's family within the meaning of the statute. Judge Tudor Rees found that the defendant was not a member of Mr. Lofty's family and without deciding the first question made an order for possession. The defendant appealed.

Sieve for the defendant. Mrs. Wollams, who except for the three years of marriage had resided with Mr. Lofty as his adopted child, from 1912 onwards was a member of Mr. Lofty's family, who had resided with Mr. Lofty for not less than six months before his death within the meaning of s. 12, sub-s. (1) (*g*) of the Act of 1920. Mr. Lofty had stood in loco parentis to her for all these years. The word "family" is only to be found in one other sub-section of the Rent Restriction Acts, viz., in s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, dealing with accommodation reasonably suitable "to the needs of the "tenant and his family as regards extent and character." There the word is obviously used with the wide meaning of "household." Primarily the word "family" in, for instance, a will, means "children." See *Pigg* v. *Clarke* (2) where

---

and Mortgage Interest (Restrictions) Act, 1935: "The expres-"sion 'tenant' includes the "widow of a tenant who was "residing with him at the time of "his death, or where a tenant leaves "no widow or is a woman, such "member of the tenant's family "so residing as aforesaid as may be "decided in default of agreement "by the county court."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13: "So much of para-"graph (*g*) of sub-section 1 of "section twelve of the Act of 1920 "as enacts that the expression "'tenant' shall in the case of a "tenant leaving no widow or "being a woman include such "member of the tenant's family "residing with him at the time of "his death as may be decided in "default of agreement by the "county court shall not, as "respects tenants dying after the "passing of this Act, apply to any "such member unless he was "residing with the tenant for not "less than six months imme-"diately before the death."

(1) [1948] 1 K. B. 482.

(2) (1876) 3 Ch. D. 672.

Jessel M.R. said: "The word 'family' has various meanings. "In one sense it means the whole household, including "servants and, perhaps, lodgers." Where a woman statutory tenant dies, her husband is a "member of the tenant's "family" within the meaning of s. 12, sub-s. 1 (*g*) of the Act of 1920. *Salter* v. *Lask* (1). In that case, Salter J. said: "It may have to be determined some day what "limit is to be put on these words 'tenant's family'" (in s. 12, sub-s. 1 (*g*)) "whether they are equivalent to 'house-"'hold' or whether they are limited as meaning blood relations "and in either case what members of the class respectively "are indicated." MacKinnon J. said: "The language used "in this Act resembles that of popular journalism rather "than the terms of the art of conveyancing." In *Price* v. *Gould* (2) Wright J., held that the word "family" in this subsection included brothers and sisters of the tenant who were living with the tenant at the time of his death. His Lordship pointed out that it had been said in a number of equity cases relating principally to wills or to settlements under powers of appointment that the word "family" was a popular, loose and flexible expression and not a technical term.

[COHEN L.J. By s. 5, sub-s. 2, of the Adoption of Children Act, 1926, "the expression 'child,' 'children' and 'issue' "where used in any disposition, whether made before or after "the making of an adoption order, shall not, unless the "contrary intention appears, include any adopted child or "children or the issue of an adopted child."]

That sub-section provides that an adoption order is not to confer on an adopted child any right to or interest in property as a child of the adopter. But this statutory right conferred by s. 12, sub-s. 1 (*g*) of the Act of 1920 is not a right of property. The real question is whether any person—the man on the Clapham omnibus—knowing the facts, would describe Mrs. Wollams as a member of Mr. Lofty's family. To that question there can be only one answer—an affirmative.

Widgery for the plaintiffs. It is submitted that the word "family" in s. 12, sub-s. 1 (*g*) of the Act of 1920, can have only one of two meanings: it means either a body of persons connected by blood or affinity or both, or a household, a meaning which could include both servants and lodgers. A man may bring into his household whom he likes. There is no other general division of individuals to which the word "family" could apply. But the word "family" cannot have the second meaning of a "household" since the words of the sub-section are "such member of the tenant's family "so residing with him as aforesaid," i.e. "residing" with him at the time of his death. If the word "family" had the second meaning of a member of the household, it would be redundant. The family means either those residing at the house in one household or those related to each other by blood or marriage, presumably scattered in different abodes, but some one or more of whom may be living with the deceased tenant of the house. There are two qualifications in this description of "tenant": he must be a member of the family of the tenant who has died and there must be the prescribed condition of residence. The word family, therefore, in this sub-section must be confined to persons connected by blood or marriage with the deceased tenant who were residing with him at the time of his death and who had been residing with him for at least six months at that time.

---

(1) [1925] 1 K. B. 584.

(2) (1930) 46 T. L. R. 411.

At common law adoption in the sense of transfer of parental rights and duties in respect of a child to another person and their assumption by him, is unknown; and the effect of an adoption order made under the Adoption of Children Act, 1926, is not to make the adopted child stand to his adopter for all purposes in the position of a child born to him in lawful wedlock. See *Ward* v. *Dorman, Long & Co. Ld.* (1) and s. 1 of the Adoption of Children (Workmen's Compensation) Act, 1934. The Rent Restriction Acts are statutes in derogation of a landlord's rights at common law and must be strictly construed. In any case, the decision was one of fact for the county court judge and there was evidence in support of his decision.

Sieve replied.

[Counsel for the defendant also contended that, on the evidence, Mr. Lofty, when he died was a statutory tenant under the Rent Restrictions Acts. Counsel for the plaintiffs contended to the contrary.]

BUCKNILL L.J. There was a preliminary point for the county court judge to deal with in his judgment: Was Mr. Lofty at the time of his death a contractual, or was he a statutory, tenant? Because, if he were a contractual tenant, by the decision of the Court of Appeal in *Thynne* v. *Salmon* (1), s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, would not apply. On the other hand, if he were a statutory tenant then s. 12, sub-s. 1 (*g*) would apply. There was no evidence on that issue on which the court could rely. A witness, Francis Creighton, gave evidence and said that the rent was never increased ; on the other hand, Stanley Lofty said that it was once increased. The position as disclosed by the correspondence between the solicitors was obscure, and it was not cleared up before the learned judge so that this court cannot decide whether this was a contractual tenancy or a statutory tenancy at the time when Mr. Lofty died.

---

(1) [1933] 2 K. B. 658.

We decided that it would be a waste of money to send the case back for a decision on that issue, which is really a preliminary point, and that first we would deal with the second point namely, whether this adopted child was a member of the tenant's family. The question of those who are included in a tenant's family has not received much consideration by the superior courts. There is no decision of the House of Lords or of the Court of Appeal on the point ; and so far as the Rent Restriction Acts are concerned, the only other reference to the word " family," as far as I know, is to be found in s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, by which (sub-s. 1) " No order or judgment " for the recovery of possession of any dwelling-house to which " the principal Acts apply or for the ejectment of a tenant " therefrom shall be made or given unless the court consider " it reasonable to make such an order or give such a judgment, " and "—then sub-paragraph (*b*)—" the court is satisfied " that suitable alternative accommodation is available for the " tenant or will be available for him when the order or judg- " ment takes effect." Then by sub-s. 3: " Where no such " certificate as aforesaid is produced to the court, accommoda- " tion shall be deemed to be suitable if it consists either (*a*) of " a dwelling-house to which the principal Acts apply ; or " (*b*) of premises to be let as a separate dwelling on terms which " will, in the opinion of the court, afford to the tenant security " of tenure reasonably equivalent to the security afforded by " the principal Acts in the case of a dwelling-house to which " those Acts apply, and is, in the opinion of the court, reason- " ably suitable to the needs of the tenant and his family."

---

(1) [1948] 1 K. B. 482.

Here again we find the use of the word "family." There is no decision, so far as I know, which throws any light upon the meaning to be given to the word "family" in that subsection.

There are some cases which throw light on this matter. In *Salter* v. *Lask* (1) the question was whether the husband of a tenant was a member of the tenant's family. Salter J. said (2): "In this case, at the time she died, Mrs. Lask "was living on the premises with her husband and a child "nine years old, and the question is whether the husband "comes within the words of s. 12, sub-s. (1) (*g*) of the Act "of 1920, 'such member of the tenant's family.' In my "opinion he does." He continued: "It may have to be "determined some day what limit is to be put on these "words 'tenant's family,' whether they are equivalent to "'household' or whether they are limited as meaning blood "relations, and in either case what members of the class respec-"tively are indicated. But I am quite satisfied that the "husband of a deceased statutory tenant is a member of that "tenant's family." The matter also was considered in the judgment of Wright J., in *Price* v. *Gould* (3). The issue there was whether brothers and sisters of a tenant were to be included in the word "family." Wright J. said: "It has "been said in a number of equity cases, relating principally "to wills or to settlements under powers of appointment, "that the word 'family,' was a popular, loose, and flexible "expression, and not a technical term. It had been laid "down that the primary meaning of the word 'family' was "children; but that primary meaning was clearly susceptible "of wider interpretation, because the cases decided that the "exact scope of the word must depend on the context and the "other provisions of the will or deed in view of the surround-"ing circumstances. Thus, in *Snow* v. *Teed* (4), it had been "held that the word 'family' could be extended beyond not "merely children but even beyond the statutory next-of-"kin." Wright J., then went on to say that in the section under consideration the word "family" did include brothers and sisters of the deceased living with her at the time of her death. He thought that that meaning was required by the ordinary acceptation of the word in that connexion, and that the legislature had used the word "family" to introduce a flexible and wide term.

(1) [1925] 1 K. B. 584.
(2) Ibid. 587.
(3) 46 T. L. R. 411.
(4) (1870) L. R. 9 Eq. 622.

The primary meaning of the word "family" therefore is "children." But if you interpret the word "children" in the flexible and wide way suggested by Wright J., in *Price* v. *Gould* (1), it seems to me that in the ordinary, popular sense of the word this woman would be considered the child of the man with whom she had lived, except for three years of her married life, ever since she was 5 years of age. There really is no more to be said about it than that, except perhaps the question as to the policy which underlies this sub-section; and if the policy is of the same kind as the policy which deals with alternative accommodation, and protects also a member of the family who has resided with the tenant at the time of his death for six months or more, I would think that in a case of this kind this adopted child clearly comes within the meaning to be given to the word "family." In the course of argument, I asked what was to be said about an illegitimate child, for instance, of the wife or of the husband, who had lived all his life with his father or with his mother. Surely the Act was intended to cover a case of that kind; and, if so, I cannot see why, giving the word "family" its ordinary popular meaning, an adopted child in a case of this kind should not also be included. I cannot think that it is a question entirely of fact as to what is the meaning of the word "family"; I think that must be a question partly of law.

That being so, in my view, this appeal must be allowed and the case must go back for the county court judge to decide whether this is a case in which the sub-section can be applied, having regard to the rule laid down in *Thynne* v. *Salmon* (2).

Cohen L.J.: I am of the same opinion. Mr. Widgery has said all that could be said to support the decision of the county court judge. He submitted that there were only two possible meanings of the word "family" in s. 12, sub-s. 1 (*g*) of the Act of 1920. The first meaning he suggested was "relations by blood or marriage," and his second meaning was "household," including all living on the premises, relatives, servants and lodgers. He excluded, and I think rightly excluded, the second sense. I do not think it can have been the intention of the legislature to protect servants and lodgers; but I am not prepared to hold that the two meanings suggested by Mr. Widgery are exhaustive. I think there is a third meaning. I respectfully agree with what was said by Wright J. (as he then was) in *Price* v. *Gould* (1) in the passage which my Lord has already read. The question the county court judge should have asked himself was this: Would an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not, have answered "yes" or "no"? To that question I think there is only one possible answer, and that is "yes." To accept Mr. Widgery's narrow view would mean excluding adopted children, children legally adopted under the Adoption of Children, 1926, and I think that the ordinary man would not distinguish between a legally adopted child and a child adopted de facto in 1912, who lived with the late Mr. and Mrs. Lofty until her marriage in 1939 and returned to the house, as her home, in 1942, when she was widowed as a result of enemy action.

---

(1) 46 T. L. R. 411.

(2) [1948] 1 K. B. 482.

Mr. Widgery suggested that the question was one of fact; but I can only say that in my opinion if the judge had directed his mind to the proper question, there was only one answer to the question before him, and there was no evidence to support the conclusion at which he arrived. If, therefore, the late Mr. Lofty was a statutory tenant, the defendant was entitled to succeed. But it was argued in the court below that Mr. Lofty was a contractual tenant. In view of his conclusion on the point, with which I have already dealt, the judge did not find it necessary to decide the second question, and we have therefore to make up our minds whether we can say that the evidence is so conclusive that we can decide this issue or whether we must send the matter back for decision. There undoubtedly was evidence on which the court below could have found in favour of the defendant; the son had said the rent had been increased, but he did not state the date. If it had been increased after the coming into force of the Rent Restrictions (Notices of Increase) Act, 1923, by s. 1 of that Act, the giving of a notice of intention to increase rent would have had the same effect as if notice had been given terminating the tenancy. If, therefore, the son meant that the notice had been given after the material date, the defendant would be entitled to succeed; but he gave no date, and although one tends to think that, having regard to the evidence as to the rent which was in fact payable at the time of Mr. Lofty's death, 7*s.* 4½*d.*, there had been a notice of increase of rent.

---

(1) 46 T. L. R. 411.

I do not think, having regard to the fact that the trustee who was called as a witness did not know that the rent had ever been increased, that we should be justified in reaching a conclusion on this point. I agree with my Lord that the matter must go back, at the landlords' risk, to the court below in order that the point which the judge left undecided may be dealt with. I agree that the appeal should be allowed.

DENNING L.J. I agree. It seems to me that "members "of the tenant's family" within s. 12, sub-s. 1 (*g*) of the Act of 1920, include not only legitimate children but also stepchildren, illegitimate children and adopted children, whether adopted in due form of law or not. If, therefore, Mr. Lofty was, at the time of his death, a statutory tenant, his adopted daughter, Mrs. Wollams, would be entitled to the protection of the Rent Restriction Acts. It is said, however, by the landlords that Mr. Lofty was a contractual tenant and not a statutory tenant, and therefore, according to the decision in *Thynne* v. *Salmon* (1), she cannot claim the protection of these Acts. There is no finding by the county court judge on that point, and it must go back to him to make a determination on it. It will depend on whether at some time in the distant past the contractual tenancy was determined by a notice to quit.

I think it important to say that the decision in *Thynne* v. *Salmon* (1) only applies when it is quite clear that there is a contractual tenancy which has not been determined. Any other view would deprive the members of a tenant's family of a protection which Parliament clearly intended them to have. In many of these cases the original tenancy was created many years ago, and it is often quite impossible for the present landlord and tenant to say whether, in years past, there has been a notice to quit, or a notice of increase which is to be deemed to be a notice to quit. It is well known, however, that in a large number of cases the tenants did become statutory tenants: and, in the absence of any express evidence covering the point, a judge may find a sufficient indication simply from the figure which is being paid for rent. Take the present case. The house has been controlled ever since 1915 when the Rent Restriction Acts came into force. It was let at a very low rent. The same tenant was there ever since 1912 until his death. The one indication in the case is that the rent being paid before he died was the sum of 7s. 4½d. That is not a sum which is likely to have been arrived at when the parties were bargaining for a contractual tenancy, or even bargaining for a contractual increase ; the odd figure of 7s. 4½d. makes it probable that at some time there was a statutory increase, and as no such increase would have been valid since the passing of the Rent Restrictions (Notices of Increase) Act, 1923, unless there had been a statutory notice of increase in due form, it is to be presumed that such a statutory notice of increase was given ; and once that presumption is made, it follows that there was a statutory tenancy because a statutory notice of increase has the same effect as if there had been a valid notice to quit. That is the sort of indication on which judges may have to act when they deal with these cases years after the original tenancy was created. It is only on indications of that kind that a decision can be reached. In this case the judge, on finding that the rent is 7s. 4½d., may infer that there was a notice of increase at some time or another, and if so, Mr. Lofty was a statutory tenant and his adopted daughter would be protected by the Acts. I agree with the order proposed by my Lord.

---

(1) [1948] 1 K. B. 482.

Appeal allowed. Case remitted to the county court.

Solicitors for the defendant : *C. R. Enever, Freeman & Co.*
Solicitors for the plaintiffs : *Champion & Co., for Turberville Smith & Co., Uxbridge.*

C. G. M.

TOWER CABINET CO. LD. v. INGRAM.

1949
Apr. 27, 28.

Lord Goddard C.J. and Birkett and Lynskey JJ.

Partnership—Change of constitution—Notice of dissolution—Advertisement—Rights of persons dealing with the firm—"Apparent members"—Partnership Act, 1890 (53 & 54 *Vict., c.* 39), *ss.* 14 *and* 36.

The expression "apparent members" in s. 36, sub-s. 1, of the Partnership Act, 1890, means all members who appear to be members to persons dealing with the firm.

In January, 1946, I. and C. began to carry on business in partnership, as household furnishers, under the name of Merry's. By agreement this partnership was dissolved in April, 1947. I. gave notice of the dissolution to the firm's bankers and arranged with C. to notify those dealing with the firm that I. had ceased to be connected with it. No advertisement of the changes was put in the London Gazette. After the dissolution new notepaper, from which I.'s name was omitted, was printed. In January, 1948, a company, which had not had previous dealings with Merry's, received an order for furniture from the new firm. That order, contrary to the arrangement between I. and C. and without I.'s knowledge, was confirmed by C. on headed notepaper which had been in use before the dissolution of the partnership and bore I.'s name as well as that of C. The company obtained judgment for the price of the goods supplied against Merry's and applied for leave to issue execution against I. as a former member of the firm.

Held, that I. had not knowingly suffered himself to be represented as a partner, in Merry's, within s. 14 of the Act; (2.) that, as the company did not know I. as a partner before the dissolution of the partnership, s. 36, sub-s. 3, of the Act applied and he was not liable for debts contracted with the company after that date.

APPEAL from Master Grundy.

The respondents claimed from Merry's (stated in the writ to be "sued as a firm") the sum of 323*l.* 17*s.* 0*d.*, the price of goods sold and delivered in January and February, 1948. Judgment was obtained and subsequently the respondents sought to render the appellant, Ingram, liable for the debts of Merry's, alleging that he was so liable under the provisions of ss. 14 and 36 of the Partnership Act, 1890 (1).

In January, 1946, the appellant and one Christmas began to carry on business in partnership under the name of Merry's. The partnership was registered under the Registration of

---

(1) Partnership Act, 1890, s. 14, sub-s. 1: "Everyone who by "words spoken or written or by "conduct represents himself, or "who knowingly suffers himself to "be represented, as a partner in a "particular firm is liable as a "partner to anyone who has on "the faith of any such representa-"tion given credit to the firm, "whether the representation has "or has not been made or com-"municated to the person so "giving credit by or with the "knowledge of the apparent part-"ner making the representation "or suffering it to be made."

Section 36, sub-s. 1: "Where a "person deals with a firm after "a change in its constitution he is "entitled to treat all apparent "members of the old firm as still "being members of the firm until "he has notice of the change."

Sub-section 2: "An advertise-"ment in the London Gazette as "to a firm whose principal place "of business is in England or "Wales . . . . shall be notice as "to persons who had not dealings "with the firm before the date of "the dissolution or change so "advertised."

Sub-section 3: "The estate of "a partner who dies, or who "becomes bankrupt, or of a part-"ner who, not having been known "to the person dealing with the "firm to be a partner, retires from "the firm, is not liable for partner-"ship debts contracted after the "date of the death, bankruptcy, "or retirement respectively."

Business Names Act, 1916, as being carried on by the appellant and Christmas. On April 22, 1947, the parties agreed to dissolve the partnership and the appellant gave notice to the firm's bankers that he had ceased to be a partner in Merry's. He arranged with Christmas that Christmas should notify those dealing with the firm that the appellant had ceased to be connected with it, but no advertisement appeared in the London Gazette. During the subsistence of the partnership the firm's notepaper had been headed " Merry's," under which the names A. H. Christmas and S. G. Ingram (the appellant) appeared, indicating that they were both partners. After the dissolution new notepaper was printed on which the name Merry's appeared and " A. H. Christmas, director." In January, 1948, " Merry's " sent, on the old notepaper used by the firm when the appellant was a member, an order to the respondents for six bedroom suites. This order was signed by Christmas as " manager." Christmas had no authority from the appellant to use that paper and its use was in direct conflict with the arrangements made on the dissolution of the partnership.

The master held that the appellant was liable as a partner, not (under s. 14) for holding himself out as a partner, but under s. 36 of the Partnership Act, 1890. The Master said that he applied *Parkin* v. *Carruthers* (1), and gave leave to the respondents under Ord. 48*a*, r. 8, to issue execution against the appellant.

J. F. Donaldson for the appellant. A partner's liability is governed by ss. 14 and 36 of the Partnership Act, 1890. Section 36 divides creditors of a firm into two classes, those who at the date of the partner's retirement knew him to be a member of the firm and secondly those who at the date of his retirement did not have that knowledge. The first class of creditors are entitled to regard him as a partner until they receive notice to the contrary, and the type of notice differs according to whether they have or have not had dealings with the firm. In the former case express notice of retirement must be given, while notice in the London Gazette is sufficient in the latter case. The time for determining knowledge is the moment of retirement. The test is a subjective one, not objective. In this case the respondents did not know of the firm of Merry's until nine months after the appellant

(1) (1790) 3 Esp. 248.

1949

TOWER CABINET CO. LD. *v.* INGRAM.

had retired, and the appellant was not a partner when the order for six bedroom suites was sent to the respondents on the notepaper used by the firm before he retired. The fact that the appellant's name was on the notepaper did not imply that he was an apparent member of the old firm, though it might conceivably mean holding out to be a member of the new firm. "Apparent" means that the alleged partner must be an apparent partner at the time the creditor is dealing with the firm. The fact that the appellants name was retained on the Business Names Register could not be regarded as general notoriety of his membership of the firm, since there was express evidence that the respondents had never referred to the register. Both *Parkins* v. *Carruthers* (1) and *Scarf* v. *Jardine* (2) are distinguishable from this case. [*Carter* v. *Whalley* (3) and *Farrar* v. *Delfinne* (4) referred to.]

Behrens and *H. Knorpel* for the respondents. Section 36, sub-s. 1, of the Partnership Act of 1890, applies to the facts of this case. Sub-section 3 of that section is concerned solely with dormant partners. Sub-section 1 is concerned with "apparent partners" and the word "apparent" means apparent to the public generally not necessarily to the persons dealing with the firm. If this were not so, then there could be no conceivable reason for using two different expressions in two different sub-sections to mean the same thing, i.e., "apparent members of the firm" in sub-s. 1 cannot have the same meaning as the words "having been known "to the person dealing with the firm to be a partner" in sub-s. 3. The words "known to be a partner" refers to a partner who is in fact a dormant partner but does happen to be known by particular individuals to be a partner. In such a case, qua those particular individuals, he is in the same position as an apparent partner. The distinction between "apparent partners" and "a person known to be a partner," is that the former is apparent to the general public, e.g., his name appearing on the door of the firm's business premises, whereas "known to be a partner" refers to a dormant partner who happens to be known to a particular individual. The word "apparent" in sub-s. 1 is not used in contra-distinction to "real." It is used as meaning "actual and known to be." The argument for the appellant is that the sub-section refers to persons who are apparent to persons dealing with the

(1) 3 Esp. 248.

(2) (1882) 7 A. C. 345.

(3) (1830) 1 B. & Ad. 11.

(4) (1844) 1 C. & K. 580.

1949

TOWER CABINET CO. LD. v. INGRAM.

firm at the time when they deal with it as members of the firm. This cannot be correct because in such a case the apparent members would be apparent as being members not of the old firm but of the new firm. Ex hypothesi the persons dealing with the firm have never dealt with it before, know nothing of any change and cannot therefore draw any distinction between an old and a new firm. They cannot therefore regard any person as being a member of the old firm. They must regard him as a member of the firm as it appears to be constituted at that time. If it is apparent to the world that a person is a partner in a firm and if persons have dealt with that firm, then under sub-s. 1 notice must be given to them of the change in the firm's constitution before the retiring partner can escape liability, and sub-s. 2 equally applies to partners where it is apparent to the world that they were partners. A distinction must be drawn between partners who are notorious and those who are profoundly secret: *Farrar* v. *Delfinne* (1). Sub-sections 1 and 2 are concerned with the former and sub-s. 3 with the latter, otherwise sub-s. 3 contains in effect a proviso on sub-s. 1 and sub-s. 1 should have read " save as hereinafter provided." This case is indistinguishable from *William* v. *Keats* (2). Here the company had before them a document which the appellant had suffered to come into existence. They relied, as they were entitled to do, upon the headed notepaper and the very fact that the appellant had taken no measures to have the notepaper corrected or destroyed brought him within s. 14 of the Act as holding himself out as a partner of the firm.

LYNSKEY J. at the request of Lord Goddard C.J. delivered the first judgment. The question is whether the company is able to make Ingram liable as a partner by reason of the provisions of the Partnership Act, 1890, concerned with holding out or with failure to give notice when a man has ceased to be a partner, and credit has been given to the firm as if he were still a partner.

The first section on which the company rely is s. 14. Before the company can succeed in making Ingram liable under this section, they have to satisfy the court that Ingram by words spoken or written, or by conduct represented himself as a partner. There is no evidence of such representation. The section says " or who knowingly suffers himself to be so

(1) 1 C. & K. 580. (2) (1817) 2 Stark. 290.

"represented." The only evidence relating to this is the fact that the order in this case was given by Christmas on notepaper which contained Ingram's name. That would amount to a representation by Christmas that Ingram was still a partner in the firm. But on the evidence and on the Master's finding, that representation was made by Christmas without Ingram's knowledge and without his authority. Such being the finding of fact, which is not challenged, it is impossible to say that Ingram knowingly suffered himself to be represented. The words are "knowingly suffers," not being negligent or careless in not seeing that all the notepaper had been destroyed when he left.

The company also rely on s. 36 of the Act, concerned with the rights of persons dealing with the firm. It is on the construction of the three sub-sections of that section that this case turns. That section has not been the subject of construction, as far as we have been informed, by any court since this Act was passed. It is said by counsel for the company that the true meaning of that section is that sub-s. 1 is concerned with the case where it is apparent to the world that a man is a partner in a firm. If it is apparent to the world, and if persons have dealt with the firm then under sub-s. 1 notice must be given to those individuals before the liability of a resigned or retired partner can cease. Secondly, he says that sub-s. 2 equally applies to the position of partners when it is apparent to the world that they were partners, and those two sections are concerned with that particular case. Referring to the old authority *Farrar* v. *Delfinne* (1) counsel for the company says that a distinction must be drawn between what are described by Cresswell J. as partners who are notorious partners and partners who are profoundly secret members of the partnership, and that this section being in the codifying Act, is really re-enacting in the form of the statute, the law as it existed in the year 1845 and later. Even in that case Cresswell J. laid considerable stress on the question of actual notice. He said: "Todd and the defendant were "once in partnership, but they had not been so since the "year 1837. The plaintiff dealt with the firm during the "partnership, and he continued to do so afterwards; and "the question is, whether the defendant is liable in respect "of such subsequent dealings now that the partnership is "dissolved. The law stands thus: if there had been a

(1) 1 C. & K. 580.

" notorious partnership, but no notice had been given of " the dissolution thereof, the defendant would have been " liable. If there had been a general notice, that would " have been sufficient for all but actual customers; these, " however, must have had some kind of actual notice. " If the partnership had remained profoundly secret, the " defendant could not have been affected by transactions " which took place after he had retired; but if the partnership " had become known to any person or persons, he would " be in the same situation as to all such persons, as if the " existence of the partnership had been notorious. The " question for you, therefore, is, was this partnership actually " known to the plaintiffs, either by the general report, or by " direct communication? Because, if it were, and he did " not know, either from notice of the fact, or from surmise, " that the dissolution had taken place, you must infer that he " still dealt on the faith of the partnership, and the defendant " will therefore be liable." It is said by counsel for the company who seeks to adopt this judgment in his favour, that s. 36, sub-ss. 1 and 2 are concerned with what are described in that judgment as notorious partnerships, and sub-s. 3 is concerned with cases of profoundly secret partners. I find difficulty, when looking at the Act itself, in adopting that suggested construction. The form of the section is: " Where " a person deals with a firm after a change in its constitution " he is entitled to treat all apparent members of the old firm " as still being members of the firm until he has notice of the " change." The whole point depends, in my view, upon what is the meaning in s. 36, sub-s. 1, of " apparent members "— Apparent to whom? Does it mean apparent to the whole world, or notorious, or does it mean apparent to the particular person with which the section is concerned? The section says: " Where a person deals with a firm . . . . he is entitled " to treat all apparent members . . . . ."

In my reading of that sub-section, " apparent members " means members who are apparently members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the notepaper, or from some sign outside the door, or because the customer has had some indirect information about them. Both sub-ss. 1 and 2 in my view are concerned with cases where they are apparent members.

Sub-section 3 again deals with the particular individual. It does not deal with the public at large. Its words are simple and obvious. It is not concerned merely with questions of apparent members or non-apparent members, but applies the test indicated by the words " A partner who, not having " been known to the person dealing with the firm to be a " partner." Those words are equally applicable whether he was an apparent partner or a dormant partner. If the person dealing with the firm did not know that the particular partner was a partner, and that partner retired, then as from the date of his retirement, he ceases to be liable for further debts contracted by the firm to such person. The fact that later the person dealing with the firm may discover that the former partner was a partner seems to me to be irrelevant, because the date from which the sub-section operates is from the date of the dissolution. If at the date of the dissolution the person who subsequently deals with the firm had no knowledge at or before that time that the retiring partner was a partner, then sub-s. 3 comes into operation, and relieves the person retiring from liability.

It has been argued for the company that they knew Ingram was a partner because the order for the goods contained a statement to that effect. In my view, that document, which only came into existence in January, 1948, was a representation by Christmas that Ingram was a partner at that particular date, but that representation was untrue. Ingram was not a partner at that date and it cannot be inferred that that representation gave the company knowledge that Ingram had in fact been a partner before the date of the dissolution of the partnership in April, 1947. Even if the representation did give such knowledge, in my view, the section had already commenced to operate, and it would not avail (subject to s. 14 which was concerned with holding out) to render Ingram liable. The result is that in this case the master was not correct in his view of the effect of the sub-section or of the decision which he cited. It is established here that the company had no knowledge that Ingram was a partner before the date of the dissolution. That being so, Ingram is brought directly within the words of sub-s. 3, and is therefore under no liability to the company in respect of the debts subsequently incurred by Christmas after Ingram had ceased to be a partner. In my view, this appeal ought to be allowed.

1949

TOWER CABINET CO. LD. v. INGRAM.

LORD GODDARD C.J. I agree. I need only add that in my opinion, the words: "all apparent members" in s. 36, sub-s. 1, mean all members apparent to the person dealing with the firm. Secondly, I think sub-s. 3 exactly applies to the facts of this case, and I see no good reason for holding that they apply to the case of a dormant partner. I think that the Act, which is a codifying Act, intends in this section to incorporate the law, except with regard to the notices in the London Gazette, which was new, laid down by Cresswell J., in *Farrar* v. *Delfinne* (1) to which my brother has referred, or at any rate to adopt the statement of law which he there lays down when he told the jury that the question for them was: "was this partnership actually "known to the plaintiffs either by general report, or by "direct communication." I am convinced that the true construction to put upon this section is that there must be actual knowledge, which may be acquired either because of the fact that it is notorious, or because it has been directly communicated. It is not sufficient to say that other people knew. The fact may be so notorious that a jury would be justified in finding that the person did know a certain fact, but it does not follow that because other people knew it, he knew it. I think that what Cresswell J. meant in that case was that the jury must be satisfied that there was actual knowledge, which might be gained from either one of two sources.

BIRKETT J. I agree.

Appeal allowed.

Solicitors for the appellant: *Windsor & Co.*
Solicitors for the respondents: *Aukin, Courts & Co.*

L. F. J. McD.

---

(1) 1 C. & K. 580.

C. A.

HODDINOTT *v.* HODDINOTT

1949
Mar. 18.

Bucknill,
Cohen and
Denning L.JJ.

Husband and wife—Housekeeping money used for stake in football pools—Joint efforts in forecasting—Wife partially responsible for success in forecasting—Winnings placed in account on which both spouses had power to draw—Part of proceeds devoted to purchase of furniture—Separation of spouses—Claim by wife to furniture.

A husband and wife regularly invested in football pools, in the husband's name, the savings on housekeeping moneys, being used for the stakes. Forecasting was the result of their joint effort. In the same week their forecasts won two prizes of 5*l.* 18*s.* and 138*l.* 7*s.* The forecast which won the smaller prize was admittedly that of the wife and the husband paid over to her that sum. The husband's cheque for the prize money was paid into his bank account and, the bank clerk suggesting that, since the bank's branch was only open three days a week, it would be convenient if both husband and wife could draw on the account, this was arranged. Part of the larger prize was used to purchase furniture for the home. Subsequently, the spouses having quarrelled and separated, the wife claimed the furniture, or, alternatively, a part of it. Each spouse claimed to be the author of the correct forecast for the larger prize. It was found, (1.) that the wife did contribute a share in the correct forecast for the larger prize, but that she was not entirely responsible for the success; (2.) that there was no gift to her of the money out of which the furniture was bought; and (3.) that there was no contract under which she was entitled to recover a specific sum, as the result of her assistance.

Held (by Bucknill L.J. and Cohen L.J., Denning L.J. dissenting) that the furniture was the husband's property. On the findings, there was neither a gift to the wife of these winnings nor a contract that she should have them. Nor did the husband hold them, or part of them, as trustee for the wife, since such a trust must be based on agreement. The wife had no legal interest in the housekeeping money as such and, if the husband invested a part of such money in football pools, the stakes being his, any proceeds or winnings from them, in the absence of a contract between the spouses as to their ownership, were the husband's. If the bank account was indeed in the joint names of husband and wife, any presumption of gift was refuted, since the account was created solely to enable the wife to draw the money from the account, the bank being open only three days a week, and the husband, in view of his work, finding it difficult to get there.

Per Denning L.J. dissenting: This prize money could be considered either as the proceeds of forecasting the result of football matches or as the proceeds of an investment made from the savings out of housekeeping allowance. The first alternative, was to his mind, the correct approach. If husband and wife together embark on a joint venture, such as that of writing a book, in which they equally contribute their skill, then if nothing is said between them as to the receipt of the proceeds, the proper inference is that they

C. A.
1949
HODDINOTT
v.
HODDINOTT

belong to them jointly. The stake money in this case was of no more importance than the paper on which such a book was written. The second alternative was to regard the prize money as the proceeds of investment made from savings from the housekeeping allowance.. These savings, before they were spent or invested, did not belong to the wife for her separate use, but he (the Lord Justice) must not be taken to accede to the view that, in equity, they belonged to the husband absolutely, since it might well be that they belonged to the spouses jointly in that they were as much due to the wife's good housekeeping as to the husband's earnings. If from these savings the spouses bought furniture, evidently intended as a continuing provision in the future for the benefit of them together, the furniture should be presumed to belong to them jointly.

APPEAL from the county court of Newport, Monmouthshire.

The parties married in 1934. The husband earned 3*l.* a week and made his wife a housekeeping allowance. The wife had no means of her own and did no work, outside her household duties. It was their practice to send in forecasts in football pool competitions and the stake money sent in was taken from the housekeeping allowance. The coupons were always made out in the husband's name but each spouse devoted effort to making the correct forecast. Any prize-money was paid by cheque in favour of the husband. On one occasion the wife made a forecast which won 11*s.* with which she bought a table-cloth.

In March, 1936, the wife and husband filled up two coupons in two different competitions each of which was successful: the one prize was 5*l.* 18*s.* and the other 138*l.* 7*s.* and the husband received a cheque for 144*l.* 5*s.* The husband paid the cheque into his bank and drew a cheque to self for 43*l.* out of which he made over to his wife 5*l.* 18*s.* the proceeds of the first prize since, in that instance, the forecast was admittedly that of the wife. The bank clerk suggested that since the bank was only open three days a week it would be convenient if both husband and wife could draw on the account, and that was arranged. The rest of the money was disposed of as follows: 5*l.* was paid to the husband's mother; 5*l.* to the wife's mother; 17*l.* was paid off on hire purchase of furniture in their possession; each bought some clothes; the wife drew out some small amounts for household expenses; and the balance was used to pay off what remained due on the furniture and so to acquire it. In 1947 disputes arose between husband and wife and they separated.

The wife applied in the county court under s. 17 of the Married Women's Property Act, 1882, for delivery over to her of this furniture on the ground that it was her property, purchased out of her own money.

At the hearing the wife swore that the second, like the first, forecast was entirely her own. The husband conceded in cross-examination that the forecast of the four "aways" which won the 138*l.* was identical with his wife's forecast, but in re-examination, he said: "*My* selection was the four "away teams."

His Honour Judge Raglan Somerset found as a fact that in order to help the husband the wife did contribute a substantial amount towards the winning pool and 5*l.* 18*s.* considerably under-estimated her contribution. But he did not accept the wife's story that she was entirely responsible for the success: he did agree that she was partially responsible. In the note of his judgment were these words: "The applicant "completely failed to satisfy me that there was a specific "gift to her of the sum out of which this furniture was purchased "or any contract under which she was entitled to recover "a specific sum as a result of her assistance. . . . That "there was any contract by which the whole or part of "this sum became the property of the applicant I was "unconvinced." Accordingly he dismissed the application.

The wife appealed.

Parnall for the wife. The only evidence was of an agreement between the husband and wife that whoever selected the winning entries by making the correct forecasts, should receive the proceeds thereof. If that were not so, why did the husband pay over to the wife the winnings of the smaller prize? The county court judge found that the wife was partially responsible for the success in the competition for the larger prize, but he did not find to what extent. In that situation he should have held that she was entitled to a joint share in the winnings. The whole question must turn on what was in the minds of the spouses when the original arrangement was made. See *Re Roger's Question* (1). Under s. 17 of the Married Women's Property Act, 1882, it is left open to the court to make such order as it thinks fit. The court has a discretion which, of course, must be exercised judicially. *Hutchinson* v. *Hutchinson* (2).

(1) [1948] 1 All E. R. 328.

(2) [1947] 2 All E. R. 792.

There was a gift to the wife by the husband of the moneys with which the furniture was bought. If this was not so, there must have been a gift of a joint share in it, since the furniture was for the use of both wife and husband. The husband agreed that this sum was to be spent on the furniture and the use of the furniture contemplated was a joint user.

[COHEN L.J. Do you contend that there was a trust ?]

In equity, the wife was entitled to the furniture or a joint share in it. The wife had an interest in the housekeeping money : when it was used for housekeeping, she enjoyed the half of what was purchased and the savings from it were due to her thrift and care. When she handed a part of it to her husband for investment in football pools she had an interest in the winnings. If she handed to him a sum from the savings for the purpose of buying a book and he agreed to purchase the book, he was not entitled to spend that sum on beer. On receipt of the winnings, the husband held them as trustee for the two of them.

These winnings were banked in the joint names of husband and wife. That action raised a presumption of gift, which was in no way rebutted. The husband and the wife entered into these competitions together as a joint venture—just as much as if they had combined to write a book, to produce an article capable of being patented, as to enter upon some commercial enterprise.

Arthur Warren for the husband. I agree with counsel for the wife that the whole question must turn on what was in the minds of the spouses when the original arrangement was made. See *Re Roger's Question* (1). But that issue was concluded by the findings of the county court judge. There was no gift to the wife of the sum out of which the furniture was purchased and there was no contract out of which she was entitled to recover a specific sum as a result of her assistance and the county court judge added that there was no contract by which the whole or part of this sum became the property of the wife. Further, there being no agreement that the husband should hold the money or the furniture as trustee for the wife, there was no trust. If there had been any agreement between husband and wife on this issue, it would not have been a contract, since the spouses would not have intended that the agreement should be attended by legal consequences. See the judgment of Atkin L.J. in *Balfour* v. *Balfour* (2).

(1) [1948] 1 All E. R. 328.

(2) [1919] 2 K. B. 571, 578–9.

C. A.

1949

HODDINOTT
v.
HODDINOTT.

If the bank account was in the name of husband and wife, there may have been a presumption of gift but such a presumption is easily rebuttable. See *Marshal* v. *Crutwell* (1). And the presumption here was rebutted since the arrangement was made at the suggestion of the bank clerk in that the bank was only open three days a week during the husband's working hours. The transfer was made merely as a mode of conveniently managing the husband's affairs. The savings from housekeeping moneys which provided the stake moneys for these football competitions were the husband's *Barrack* v. *M'Culloch* (2); *Montgomery* v. *Blows* (3) and *Blackwell* v. *Blackwell* (4) and the winnings therefrom belonged to the husband, as did the furniture purchased with those winnings. Neither the winnings nor the furniture were ever given to the wife.

Parnall replied.

BUCKNILL L.J. Mr. Parnall has argued, first of all, that there was, in effect, a clear arrangement between husband and wife that whoever selected the winning entries should take the prize. If there was any such arrangement, that point fails on the finding of the learned judge that it was not she who selected the winning teams. Then Mr. Parnall said that at some time a trust arose. The way he put it, I must say, aroused my admiration, because, in my opinion, it was an awkward point to have to tackle. However, he submitted that the wife had an interest in the housekeeping money and that when she handed it to the husband she had an interest in the winnings, and that he held the winnings in trust for each of them.

First, I am not at all satisfied that she had got any legal interest in the housekeeping money as such. The money belonged to the husband, and I should have thought she held it in trust for him for keeping them both, and if the husband decides to take some of it away from the purchase of food and such things to invest it in football pools, it seems to me that the money still remained his, and that in the absence of any contract between them the proceeds or winnings on that housekeeping money also belong to him. It therefore seems to me that everything must turn on the question whether there was a binding contract between these two people that

(1) (1875) L. R. 20 Eq. 328.

(2) (1856) 3 K. & J. 110.

(3) [1916] 1 K. B. 899.

(4) [1943] 2 All E. R. 579.

they should share the proceeds of these bets. I think it was Evershed L.J. who said, in *Re Roger's Question* (1) that it all turned on what was in the minds of the parties when the purchase, in that case, was made. The learned judge in this case has come to quite a clear conclusion on that issue. He said : " The applicant completely failed to satisfy me that " there was a specific gift to her of the sum out of which this " furniture was purchased or any contract under which she " was entitled to recover a specific sum as a result of her " assistance." Later in his judgment, he said : " that there " was any contract by which the whole or part of this sum " became the property of the applicant I was completely " unconvinced."

I would like to refer quite shortly to the judgment of Atkin L.J. in *Balfour* v. *Balfour* (2). That was a dispute on an alleged agreement by which the husband undertook to make his wife an allowance of 30*l.* a month whilst he was abroad. He failed to make the allowance and the wife sued the husband, and the Court of Appeal held that the alleged agreement did not constitute a legal contract, but was only an ordinary domestic arrangement which could not be sued upon, and that mutual promises made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract. Atkin L.J. said : " It constantly happens, I think, that such arrange" ments made between husband and wife are arrangements " in which there are mutual promises, or in which there is " consideration in form within the definition that I have " mentioned. Nevertheless they are not contracts, and they " are not contracts because the parties did not intend that " they should be attended by legal consequences. To my " mind it would be of the worst possible example to hold that " agreements such as this resulted in legal obligations which " could be enforced in the courts. It would mean this, that " when the husband makes his wife a promise to give her " an allowance of 30*s.* or 2*l.* a week, whatever he can afford " to give her, for the maintenance of the household and children, " and she promises so to apply it, not only could she sue him " for his failure in any week to supply the allowance, but he " could sue her for non-performance of the obligation, express " or implied, which she had undertaken upon her part. All " I can say is that the small courts of this country would have

(1) [1948] 1 All E. R. 328.

(2) [1919] 2 K. B. 571, 579–9.

"to be multiplied one hundredfold if these arrangements were "held to result in obligations. They are not sued upon, "not because the parties are reluctant to enforce their legal "rights when the agreement is broken, but because the parties, "in the inception of the arrangement, never intended that "they should be sued upon. Arrangements such as these are "outside the realm of contracts altogether." I think those words apply to this case. I think that the judgment of the learned county court judge was right, and that this appeal fails.

COHEN L.J.: I am of the same opinion. The temptation to give a Solomon's judgment in this case is great, but the learned judge resisted it, and, in my opinion, it is impossible to say that there was no evidence to support his conclusion.

In the court below Mr. West, who then appeared for the plaintiff, submitted that there was evidence of a gift of the stake moneys entitling the wife to the winnings, alternatively, that she was also entitled by the fact that she had, at his request, made a forecast on the understanding that she would receive the winnings. He also said that the burden which she undertook in supplying the forecast was itself a consideration for the promise. The learned judge (and I am reading from his own note) said: "The applicant completely "failed to satisfy me that there was a specific gift to her of the "sum out of which this furniture was purchased or any con-"tract under which she was entitled to recover a specific "sum as a result of her assistance"; and later he said: "But that there was any contract by which the whole or part "of this sum became the property of the applicant I was "completely unconvinced." These findings, in my opinion, dispose of two arguments, which were naturally the first two arguments which Mr. Parnall advanced in this court. It seems to me quite impossible to say that there was no evidence to support them, and in those circumstances, in so far as the matter rests on contract or on gift, I consider that the matter is concluded by the learned judge's finding.

Mr. Parnall, somewhat at the invitation of the court, put the alternative suggestion that the husband had become trustee of this money, or alternatively of part of it, for the wife. The grounds on which Mr. Parnall sought to support that contention have been stated by my Lord. I only desire to add that, there being nothing in the nature of a deed poll or anything of that kind, it seems that such a trust, if it existed at all, could only have arisen under an agreement ; and it seems to me that the possibility of such an agreement is disposed of by the learned judge's finding that there was no contract relating to the football coupons or stake money, or to the proceeds of the successful results.

Another matter which was mentioned in the course of the argument was the question whether there might not be a presumption of a gift of the money or half of it from the fact of the money being placed in joint names at the bank. Prima facie, if a husband places his money in the joint name of his wife and himself, it does raise a presumption of gift ; but in the present case, first of all, as my Lord points out, it is by no means clear that the husband did place it in joint names. It seems just as consistent with the evidence that he placed it in his own name but gave his wife power to draw on his own account. Even if it was placed in joint names, in the case of a banking account, such a presumption is readily refutable. I would refer to the case of *Marshal* v. *Crutwell* (1) where a husband, in failing health, transferred his banking account from his own name into the names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife ; and he afterwards paid in considerable sums to this account. All cheques were thereafter drawn by the wife at the direction of her husband, and the proceeds were applied in payment of household and other expenses. After his death the wife claimed to be entitled to the balance, but it was held that the transfer of the account was not intended to be a provision for the plaintiff but merely a mode of conveniently managing her husband's affairs. So here it seems to me that the joint account, if it was a joint account, may well have been created solely for the purpose of enabling the wife to draw the money because the bank was only open three days a week, and the husband, a working man, may have found it extremely difficult to get there. In my opinion, therefore, this argument, if it was open to the wife, which is by no means clear, also fails.

Finally, it was suggested that there was something short of gift or agreement which might support the case of the wife. It was said that as she had contributed her skill to the satisfactory result which produced this 138*l*. odd, she must be entitled, having regard to the relationship between husband

---

(1) L. R. 20 Eq. 328.

and wife, to some share in the proceeds. Well, this is a right which to my mind has no foundation in law, and is entirely without precedent. Indeed, it seems to me to be inconsistent with the view of the relationship between husband and wife stated by Atkin L.J. in the passages from *Balfour* v. *Balfour* (1) which my Lord has read. For those reasons I think the appeal fails.

DENNING L.J. In my opinion, this appeal should be allowed. The husband and wife entered into football competitions weekly. The entrance money came out of the housekeeping allowance, or the savings from it. The husband said that the wife was entitled to any money she won by her own "shots," and, no doubt, anything he won by his "shots" would go to him. On this particular occasion, however, as I understand the judge's findings, there was a joint effort by which a prize of 138*l.* was won. The wife's contribution of skill was no less important and perhaps more important than that of the husband. After the money was won the husband went about saying: "Look what a clever wife I have got, "only one in fifty would have put the money on such poor "teams as those." The prize money was put into joint names and later furniture was purchased with it for the house. Many years afterwards the parties separated and the question is: To whom does the furniture belong?

There are two different ways of regarding the prize money. One way is to regard it as the proceeds of skill in forecasting; the other way is to regard it as the proceeds of an investment made out of the savings from the housekeeping allowance. To my mind the first is the correct approach. The prize money is the proceeds received of the skill of husband and wife together jointly, just as if they had written a book jointly, each taking an equal indivisible part in it. The entrance money was of no more importance than the paper on which a book is written. It was entirely subservient to the skill, like the paper for a book or the canvas for a painting. In my judgment, if husband and wife together embark on a joint venture in which they equally contribute their skill, then if nothing is said between them, the proper inference is that the proceeds go to them jointly. I do not believe that it is the law that the wife takes nothing, unless she can prove an express contract by the husband to give her a part of it. I should have thought

(1) [1919] 2 K. B. 571, 579.

C. A.

1949

HODDINOTT
v.
HODDINOTT.

Denning L.J.

that the prize money, being the result of their joint efforts, belonged to them jointly, and the eventual proceeds—the furniture—also belonged to them jointly.

But assuming that is the wrong way of looking at the matter, the next question is what is the position if the prize money is regarded as the proceeds of an investment made out of the savings from the housekeeping allowance. Upon this point I would say that while husband and wife are living together on good terms, the arrangements which they make for payment of housekeeping allowances are not legal contracts which will be enforced by a court of law; they are private arrangements, and if differences arise about them while the parties are living together they must be settled by agreement between them, for assuredly they will not be settled by the courts. That is clear from the case of *Balfour* v. *Balfour* (1), which my Lord has cited. Nevertheless, these arrangements often result in property being acquired. The good wife, by wise housekeeping, may be able to put some of it aside; and the savings may be spent in buying clothes or furniture or paying instalments to a building society or investing in saving certificates or, as here, in that more speculative investment, the football pools. The arrangements made by the parties on these matters, again, are not legal contracts, and cannot while incomplete be enforced by the courts. Nevertheless, if the parties afterwards fall out or separate or are divorced, the courts have to decide to whom the property belongs, and they have to do so without having any contract to guide them. These questions cannot ordinarily be decided by action at law: for, as a rule, actions of tort do not lie between husband and wife. They can and should be decided by applications under s. 17 of the Married Women's Property Act, 1882, in which the judge is called on to make such order "as he thinks "fit." These words have been held to give a judicial discretion to the court, but, of course, this discretion has to be exercised according to the principles of law.

It is quite plain that the savings from the housekeeping allowance, before they are spent or invested, do not belong to the wife for her separate use. That was settled in cases before the passing of the Married Women's Property Acts, and, since those Acts, it has been held that if the wife takes the savings and converts them to her separate use, as for instance if she puts them into her own name without her husband's consent, she will be compelled to hand them over to her husband, who is the legal owner. However, I must not be taken to accede to the view that in point of equity the savings belong to the husband absolutely. It may be that they belong to both jointly, because they are as much due to the wife's good housekeeping as to the husband's earnings. In point of equity each is entitled to an equal voice in saying how they should be spent. The decision in this, as in other questions of common concern during the marriage, must be reached by agreement—by give and take—and not by the dictation of one to the other.

---

(1) [1919] 2 K. B. 571, 579.

Howsoever that may be, when they agree to buy clothes or furniture with the savings or to make an investment, they may also agree to whom it is to belong; but if, as so often happens, they leave that unsaid, the title depends on the nature of the property bought or the investment made. If clothes are bought by the wife, they are, of course, hers; if money is invested in the wife's name, it is presumably hers. Conversely, when money is invested in the husband's name, it is his. But if they invest money in their joint names, or buy furniture with it, which is obviously intended as a continuing provision in the future for the benefit of them together, in my opinion it should be presumed to have belonged to them jointly.

So also here. When money is spent in sending in entries for football pools, then if each makes his own separate effort, each takes his own winnings; but if they make a joint effort, I should have thought that the winnings belonged to them jointly. On the facts of this case, as I see them, the winnings were due to the joint efforts of the husband and wife. Then they were put into the joint account at the bank and furniture was bought so as to be a continuing provision for both of them. In my opinion the proper inference from those facts is that it was the property of both jointly.

I am sorry to differ from my brothers but I cannot help thinking that this difference of opinion is due to a different view of the facts. If this were not a joint effort, but was really the husband's effort with subsidiary assistance by the wife—as, if he wrote a book and she helped to revise the proofs—I would agree that the reward would be his and she would be entitled to nothing in law, unless she could prove a contract by him to give her part of it. On those facts the proper inference would be that it was merely gratuitous assistance by the wife. But, as I read the judge's findings, this was really a joint effort: and if so, the proper inference is that the prize money belonged to them jointly.

Appeal dismissed.

Solicitors for the wife: *Collyer-Bristow & Co. for D. Granville West, Newbridge, Mon.*

Solicitors for the husband: *Gibson & Weldon, for Everett & Tomlin, Pontypool.*

Dictum of DENNING, L.J., at p. 429, *applied.* *Re* POWER'S SETTLEMENT TRUSTS. [1951] 2 All E.R. 513.

Applied. *In re* POWER'S SETTLEMENT [1951] Ch. 107

THE ROYAL COURT DERBY PORCELAIN CO. LD. v. RAYMOND RUSSELL.

C. A.
1949
Mar. 15.

Bucknill, Cohen and Denning L.JJ.

Landlord and tenant—Interpretation of statute—Rent restriction—"Was let to him in consequence of that employment"—Rule of construction—Words or phrase in statute the subject of judicial interpretation—Repeal and re-enactment of words or phrase—Assumption that Parliament knows of and enacts the judicial interpretation—True view and limit of the rule—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*g*).

The Rent and Mortgage Interest (Restrictions) Act, 1920, by sub-s. 1 of s. 5, provided, inter alia, that an order for possession of a dwelling-house could be made where a dwelling-house was reasonably required by the landlord for some person in his whole-time employment and the court considered it reasonable so to do and that in such case the existence of alternative accommodation should not be a condition of an order or judgment for recovery of possession of the dwelling-house, where the tenant was in the employment of the landlord and "the dwelling-house was let to "him in consequence of that employment and he has ceased to "be in that employment." A Divisional Court in *Frederick Braby & Co. Ld.* v. *Bedwell* [1926] 1 K. B. 456, decided that for this provision not only the landlord but the tenant must know that the dwelling-house was let to him "in consequence of his employ-"ment." By s. 18 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 5, sub-s. 1 of the Act of 1920 was repealed and by s. 3 of, and the first schedule to, the Act of 1933 this provision of s. 5, sub-s. 1, of the Act of 1920 was re-enacted in very much the same words. The Court of Appeal in *Braithwaite & Co., Ld.* v. *Elliot* [1947] K. B. 177 following *Benninga (Mitcham), Ld.* v. *Bijstra* [1946] K. B. 58, held that the court, in considering whether the dwelling-house was let to the tenant "in consequence "of that employment," had only to inquire what was in the mind of the landlord; it was irrelevant whether the tenant knew

C. A.

1949

The Royal Court Derby Porcelain Co. Ld. *v.* Raymond Russell.

or did not know of that fact, thus overruling the decision of the Divisional Court in *Frederick Braby & Co., Ld.* v. *Bedwell.* It was now submitted that where a word of doubtful meaning in a statute had received a clear judicial interpretation, a subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase was interpreted according to the meaning that had previously been assigned to it (see *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* [1933] A. C. 402). Accordingly, it was said that the decision of the Court of Appeal in *Braithwaite & Co., Ld.* v. *Elliot* had been made per incuriam and in view of *Young* v. *Bristol Aeroplane Co., Ld.* [1944] K. B. 718, the decision in *Braithwaite's* case (*supra*) should not be followed by the Court of Appeal.

Held, that the court would follow its own decision in *Braithwaite's* case (*supra*). It could not be that whenever Parliament re-enacted the provision of a statute, it thereby gave statutory authority to every erroneous interpretation which had been put upon it.

Per Denning L.J.: The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been followed, and it will be more than usually slow to do so, when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision, in fact, is shown to be erroneous, there is no rule of law which prevents it being overruled.

Appeal from Derby county court.

Raymond Russell, the defendant, entered the employment of the plaintiff company in 1926. In 1940, whilst still in that employment, he became the tenant of a cottage which was owned by the plaintiff company. In April, 1941, the defendant left the service of the company, but continued to reside with his wife in the cottage. In November, 1941, he joined the Army, and remained in the Forces (his wife remaining in the cottage) until April, 1946, when he re-entered the service of the plaintiff company. In May, 1948, he left that employment and the company gave him due notice to quit the cottage. The defendant remained in possession, contending that he was protected by the Rent Restriction Acts; whereupon the company brought an action in the county court claiming possession. There was no evidence that suitable alternative accommodation was available for the tenant or would be available for him when the order or judgment took effect.

His Honour Judge Willes found: (I.) that the dwelling-house was reasonably required by the company for occupation as a residence for some person engaged in their whole-time employment within the meaning of s. 3 of and para. (g) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment)

Act, 1933 (1); (2.) that the tenant was in the employment of the company and that the dwelling-house was let to him, in consequence of the employment and he had ceased to be in that employment; and (3.) that the defendant had never heard or known that his tenancy was conditional on his remaining in the employment of the company. Accordingly, he felt bound to follow the decision in *Braithwaite & Co. Ld.* v. *Elliot* (2) and he made an order for recovery of possession of the cottage.

The defendant appealed.

W. R. Handforth for the tenant. The decision of the Court of Appeal in *Braithwaite & Co. Ld.* v. *Elliot* (2) was wrong, being made per incuriam and the Court of Appeal is not bound to and should not follow it. *Young* v. *Bristol Aeroplane Co. Ld.* (1).

---

(1) By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "No order or judgment for the "recovery of possession of any "dwelling-house to which this Act "applies or for the ejectment of a "tenant therefrom shall be made "or given unless . . . . (*d*) the "dwelling-house is reasonably "required by the landlord for "occupation . . . . for some per"son in his whole-time employ"ment . . . . and (except as "otherwise provided by this sub"section) the court is satisfied "that alternative accommoda"tion . . . . is available . . . . "and in any such case as afore"said, the court considers it "reasonable to make such an "order or give such judgment. "The existence of alternative "accommodation shall not be a "condition of an order or judg"ment on any of the grounds "specified in para. (*d*) of this sub"section—(1.) where the tenant "was in the employment of the "landlord or a former landlord, "and the dwelling-house was let "to him in consequence of that "employment and he has ceased "to be in that employment . . . . "

Sub-section 1, of s. 5, of the Act of 1920 was repealed by s. 18 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

By s. 3, sub-s. 1, and the first schedule to the Act of 1933 a court, for the purposes of s. 3 of the Act, was to have power to make or give an order or judgment for the recovery of possession of a dwelling-house to which the Acts applied without proof of suitable alternative accommodation "(where the court considered it "reasonable so to do)" if "(*g*) the "dwelling-house is reasonably re"quired by the landlord for "occupation as a residence for "some person engaged in his whole"time employment . . . . or with "whom, conditional upon housing "accommodation being provided, "a contract for such employment "has been entered into and "either—(1.) the tenant was in the "employment of the landlord or "a former landlord, and the "dwelling-house was let to him in "consequence of that employ"ment and he has ceased to be "in that employment . . . ."

(2) [1947] K. B. 177.

By s. 5, sub-s. 1, of the Rent and Mortgage Interest (Restrictions) Act, 1920, an order for the recovery of possession of a dwelling-house could be made where the house was reasonably required by the landlord for some person in his whole-time employment and the court considered it reasonable to make the order. It was provided that the existence of alternative accommodation should not be a condition of an order or judgment for the recovery of possession of the house where the tenant was in the employment of the landlord and "the dwelling-house was let to him in consequence of "that employment and he has ceased to be in that "employment." In *Queen's Club Gardens Estates Ld.* v. *Bignell* (2), there was an obiter dictum of Lush J. on the construction of the words "let to him in consequence of that "employment." He said: "In my view they mean, not that "the landlord only knows, but that both the landlord and the "tenant know, that the premises were let to the tenant in "consequence of his employment." In *Frederick Braby & Co. Ld.* v. *Bedwell* (3), a Divisional Court of the King's Bench Division held that the words "in consequence of" imply causation "and mean that the tenancy was created in con-"sequence of the employment. The court must be satisfied "not only that the landlords let the premises to the defendant "in consequence of his being in their employment, but also "that the defendant took the premises in consequence of his "being in their employment." That was the judicial construction given to those words when the sub-section was repealed by s. 18 and replaced by s. 3, sub-s. 1, of and sch. I. (*g*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

By these provisions, para. (*d*) of sub-s. 1 of s. 5 of the Act of 1920 was re-enacted, the material words in the re-enactment being "the tenant was in the employment of the landlord or "a former landlord and the dwelling-house was let to him in "consequence of that employment and he has ceased to be in "that employment."

In *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.* (4) Lord Buckmaster said (5): "It has been a well established

(1) [1944] K. B. 718.
(2) [1924] 1 K. B. 117, 132.
(3) [1926] 1 K. B. 456.
(4) [1933] A. C. 402.
(5) Ibid. 411.

C. A.
1949

THE ROYAL COURT DERBY PORCELAIN CO. LD.
v.
RAYMOND RUSSELL.

"principle to be applied in the consideration of Acts of "Parliament that, where a word of doubtful meaning has "received a clear judicial interpretation, the subsequent "statute which incorporates the same word or the same "phrase in a similar context, must be construed so that the "word or phrase is interpreted according to the meaning "that has previously been assigned to it." See also the judgment of James L.J. in *Ex parte Campbell, In re Cathcart* (1), and of Lord Halsbury in *Webb* v. *Outrim* (2). The words in para. (*g*) of sch. I. to the Act of 1933 "the dwelling-house was "let to him in consequence of that employment" mean not only that the landlords let but that the tenant took the dwelling-house in consequence of his being in that employment since Parliament enacted those words with knowledge of the decision in *Frederick Braby & Co. Ld.* v. *Bedwell* (3). The Court of Appeal therefore in *Braithwaite & Co. Ld.* v. *Elliot* (4) were wrong in their interpretation of the statute. The Court of Appeal today is not bound to follow a decision of its own, if it is satisfied that the decision was given per incuriam, e.g., where a statute which would have affected the decision was not brought to the attention of the earlier court.

Scott Henderson K.C. and *N. F. M. Robinson* for the landlord company. It is submitted that the court will follow the decision of the Court of Appeal in *Braithwaite & Co. Ld.* v. *Elliot* (4). It cannot be suggested that the Court of Appeal were unaware that the material provision in the two Acts of 1920 and 1933 was in practically the same words and that the court were ignorant of the rule of interpretation or construction referred to in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.* (5) and the other cases cited for the tenant. The attention of the court in *Braithwaite & Co. Ld.* v. *Elliot* (4) was directed to the decision of the Divisional Court in *Frederick Braby & Co. Ld.* v. *Bedwell* (3) and they deliberately overruled that decision, which had stood unchallenged for twenty years, until the decision in *Benninga (Mitcham), Ld.* v. *Bijstra* (6). The decision was not given per incuriam. The reasoning of that decision appears in the judgment of Morton L.J. (7): "The material question is: What was the "reason which actuated the landlord in letting the cottage

---

(1) (1870) L. R. 5 Ch. 703, 704.
(2) [1907] A. C. 81, 89.
(3) [1926] 1 K. B. 456.
(4) [1947] K. B. 177.
(5) [1933] A. C. 402.
(6) [1946] K. B. 58.
(7) [1947] K. B. 181–2.

C. A.

1949

THE ROYAL COURT DERBY PORCELAIN CO. LD. v. RAYMOND RUSSELL.

"to the tenant? The wording of the paragraph is: 'and "'the dwelling-house was let to him in consequence of that "'employment.' When there is an agreement of letting, "the landlord agrees to let and the tenant agrees to take, "and, in my view, one has to inquire only: what was in the "mind of the person who let? Was the house let to the "tenant in consequence of his employment or was it let to him "for some other reason?" It cannot be assumed that Parliament when re-enacting in a Rent Restriction Act the terms of a previous Rent Restriction Act has to bear in mind every decision that has been given by the court on the words of the earlier statute.

W. R. Handforth replied.

BUCKNILL L.J. The learned judge, in a very careful reserved judgment for which this court is indebted, has set out the facts and has said that he considered himself bound by the decision of the Court of Appeal in *Braithwaite & Co. Ld.* v. *Elliot* (1), and the only question that we have to decide is whether we are, under the circumstances, bound to follow *Braithwaite's* case or not.

By s. 5, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "No order or judgment "for the recovery of possession of any dwelling-house to which "this Act applies, or for the ejectment of a tenant therefrom, "shall be made or given unless . . . . (*d*) the dwelling-"house is reasonably required by the landlord for occupation "as a residence for himself, or for any person bona fide residing "or to reside with him, or for some person in his whole time "employment or in the whole time employment of some "tenant from him, and (except as otherwise provided by this "sub-section) the court is satisfied that alternative accom-"modation, reasonably equivalent as regards rent and "suitability in all respects, is available . . . . and in any "such case as aforesaid, the court consider it reasonable "to make such an order or give such judgment." Then the sub-section provides: "The existence of alternative "accommodation shall not be a condition of an order or "judgment on any of the grounds specified in para. (*d*) of "this sub-section—(i) where the tenant was in the employment "of the landlord or a former landlord, and the dwelling-house "was let to him in consequence of that employment and he

---

(1) [1947] K. B. 177.

"has ceased to be in that employment." That being the law and the statute, in 1926 the case of *Frederick Braby & Co. Ld.* v. *Bedwell* (1) was decided by the Divisional Court. The facts there were that the plaintiffs wished to regain possession of a house under the sub-section to which I have referred, and the Divisional Court decided that the words "in "consequence of" implied causation (1), "and mean that the "tenancy was created in consequence of the employment. "The court must be satisfied not only that the landlords "let the premises to the defendant in consequence of his "being in their employment, but also that the defendant "took the premises in consequence of his being in their "employment. The judge finds that the defendant did not "know that his tenancy was conditional on his remaining "in the employment of the plaintiffs; he had never heard "of it and knew nothing about it. There is no direct authority "on this point, but there is a dictum of Lush J. in *Queen's Club Gardens Estates Ld.* v. *Bignell* (2) which is to that effect. "He says: 'In my view they mean, not that the landlord "'only knows, but that both the landlord and the tenant "'know, that the premises were let to the tenant in consequence "'of his employment'."

That being the law as laid down by the Divisional Court, in 1933 the law was, in substance, re-enacted as contained in the sub-section of the Act of 1920 to which I have referred. It was put rather differently because by s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "No order or judgment for the recovery of possession of any "dwelling-house to which the principal Acts apply or for the "ejectment of a tenant therefrom shall be made or given "unless the court considers it reasonable to make such an "order or give such a judgment, and either (*a*) the court "has power so to do under the provisions set out in the first "schedule to this Act, or the court is satisfied that suitable "alternative accommodation is available for the tenant "or will be available for him when the order or judgment "takes effect," and then if you turn to the first schedule to the Act you find practically the same words repeated as in the Act of 1920.

When the case of *Braithwaite & Co. Ld.* v. *Elliot* (3) was decided in 1947 in the Court of Appeal, Morton L.J., who

---

(1) [1926] 1 K. B. 456, 459.

(2) [1924] 1 K. B. 117, 132.

(3) [1947] K. B. 177.

C. A.

1949

THE ROYAL COURT DERBY PORCELAIN CO. LD. *v.* RAYMOND RUSSELL.

Bucknill L.J.

was presiding, had to deal with this question which was raised and decided in the case of *Frederick Braby & Co. Ld.* v. *Bedwell* (1) whether the knowledge of the defendant was essential. I will read what he said (2): "The principal "reason which led the judge to arrive at that conclusion "appears in the following passage in his judgment: 'When "'the cottage was let to the tenant in November, 1937, he "'was in the employment of the landlords and the landlords "'would not have let the cottage to the tenant had he not been "'in their employ, but I do not find that the tenant knew "'the fact or that he knew the cottage was let to him in "'consequence of his employment by them. There is nothing "'to show that the tenant knew that his tenancy was "'conditional on his remaining in the landlords' employment. "'On these facts it appears to me upon the authority of "'*Frederick Braby & Co. Ld.* v. *Bedwell* (1) and *Queen's* "'*Club Gardens Estates Ld.* v. *Bignell* (3) that the letting in "'November, 1937, was not in consequence of the tenant's "'employment'." That is the end of the quotation from the judgment of the county court judge. Then Morton L.J. goes on: "In my view, at this stage the judge has misconstrued "the paragraph, and I think it unlikely that he would have "arrived at that conclusion if his attention had been directed "to *Benninga (Mitcham) Ld.* v. *Bijstra* (4). In my view, "the material question is: what was the reason which "actuated the landlord in letting the cottage to the tenant? "The wording of the paragraph is: 'and the dwelling-house "'was let to him in consequence of that employment.' When "there is an agreement of letting, the landlord agrees to let "and the tenant agrees to take, and, in my view, under the "paragraph one has to inquire only: what was in the mind "of the person who let? Was the house let to the tenant "in consequence of his employment, or was it let to him for "some other reason? That matter is, in my view, concluded "against the tenant in the present case by *Benninga* "*(Mitcham) Ld.* v. *Bijstra* (4). If I may further quote from "my judgment: 'As to question (iv)'—that is the question "now under consideration—'it was stated by this court in "'*Read* v. *Gordon* (5) that the crucial time at which this "'question must be decided is the date of the notice to quit.

---

(1) [1926] 1 K. B. 456.
(2) [1947] K. B. 177, 181.
(3) [1924] 1 K. B. 117.
(4) [1946] K. B. 58.
(5) [1941] 1 K. B. 495, 505.

" 'In my view the question which has to be decided, as at " 'that time, may be accurately stated as follows: Was the " 'tenancy, which was determined by the notice to quit, " 'a tenancy which had been granted to the tenant in " 'consequence of his employment by the landlord?' It " seems to me that the judge has answered that question in " favour of the landlords: he has said, 'the landlords would " 'not have let the cottage to the tenant had he not been " 'in their employ.' That, to my mind, is a finding of fact " which concludes this point against the tenant. The judge " then goes on to discuss other questions which are, in my " view, irrelevant. He says: 'I do not find that the tenant " 'knew the fact' above referred to—to my mind whether " he knew it or not is irrelevant—'or that he knew the cottage " 'was let to him in consequence of his employment by them' " that again, in my view, is irrelevant. He goes on to say: " 'There is nothing to show that the tenant knew that his " 'tenancy was conditional on his remaining in the landlords' " 'employment.' I cannot find in the paragraph of the " schedule the slightest trace of any of these matters being " relevant to the consideration of the matter before the court. " *Frederick Braby & Co. Ld.* v. *Bedwell* (1) and *Queen's Club* " *Gardens Estates Ld.* v. *Bignell* (2) were not cited to this court " in *Benninga* (*Mitcham*) *Ld.* v. *Bijstra* (2), but I feel bound " to say that, in my view, *Frederick Braby & Co. Ld.* v. " *Bedwell* (1) was wrongly decided."

The argument put before us for the tenant is, that it was not open to the Court of Appeal in *Braithwaite's* case (4) to come to that finding of fact, having regard to the decision of the Divisional Court in 1926 in *Frederick Braby & Co. Ld.* v. *Bedwell* (1), and having regard to the rule of interpretation of statutes which has been enunciated in several cases, the latest being the case of *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.* (5), where Lord Buckmaster, when dealing with the meaning of the word "wreck" in the Merchant Shipping Acts, said: "The respondents here have based " the main part of their case, as explained in the reasons " they have given, upon the ground that *The Olympic* (6) " was wrongly decided, and that the limited and relative " meaning there attributed to the word 'wreck' is not the true

---

(1) [1926] 1 K. B. 456.
(2) [1924] 1 K. B. 117.
(3) [1946] K. B. 58.
(4) [1947] K. B. 177.
(5) [1933] A. C. 402, 411.
(6) [1913] P. 92.

C. A.

1949

THE ROYAL COURT DERBY PORCELAIN CO. LD. *v.* RAYMOND RUSSELL.

Bucknill L.J.

"interpretation of the phrase. I do not think that the "consideration of that question is open to this House. It "has long been a well established principle to be applied in "the consideration of Acts of Parliament that where a word "of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the "same word or the same phrase in a similar context, must "be construed so that the word or phrase is interpreted "according to the meaning that has previously been assigned "to it. James L.J., in the case of *Ex parte Campbell* (1) "expresses this rule in the following terms: 'Where once "'certain words in an Act of Parliament have received a "'judicial construction in one of the Superior Courts, and "'the Legislature has repeated them without alteration in a "'subsequent statute, I conceive that the Legislature must "'be taken to have used them according to the meaning "'which a court of competent jurisdiction has given to them.' "And this opinion was expressed in a case where the learned "Lord Justice himself said it was difficult to bring the "interpretation within the words of the Act. The same opinion "was expressed by Lord Halsbury in delivering the judgment "of the Judicial Committee in the case of *Webb* v. *Outrim* (2), "and I know of no authority that has in any way weakened "the effect of this pronouncement. It is in my opinion a "salutary rule and one necessary to confer upon Acts of "Parliament that certainty which, though it is often lacking, "is always to be desired."

That being so, Mr. Handforth contends that the Divisional Court having given a judicial interpretation of the words "in consequence of," the Court of Appeal in the case of *Braithwaite & Co. Ld.* v. *Elliot* (3) was obviously wrong in saying, in effect, that the statute of 1933 meant something which is inconsistent with the decision in *Frederick Braby & Co. Ld.* v. *Bedwell* (4), and that Parliament, in as much as in 1933 it followed the words of the statute of 1920 which had been interpreted by the Divisional Court in *Frederick Braby & Co. Ld.* v. *Bedwell* (4), must have intended the words of the Act of 1933 to have the meaning assigned to them by the Divisional Court. That being so, Mr. Handforth says that this court is not bound to follow *Braithwaite's* case (3), in accordance with the principles laid down by the Court of

(1) L. R. 5 Ch. 703, 706.

(2) [1907] A. C. 81, 89.

(3) [1947] K. B. 177.

(4) [1926] 1 K. B. 456.

Appeal in the judgment of Lord Greene M.R., in *Young* v. *Bristol Aeroplane Co. Ld.* (1). Lord Greene said: "Where "the court has construed a statute or a rule having the force "of a statute its decision stands on the same footing as any "other decision on a question of law, but where the court is "satisfied that an earlier decision was given in ignorance "of the terms of a statute or a rule having the force of a "statute the position is very different. It cannot, in our "opinion, be right to say that in such a case the court is "entitled to disregard the statutory provision and is bound "to follow a decision of its own given when that provision "was not present to its mind. Cases of this description "are examples of decisions given per incuriam."

Speaking for myself, I am not prepared to say that the Court of Appeal in *Braithwaite's* case (2) was ignorant of the fact that the terms of the Act of 1933 were practically the same as the terms of the Act of 1920, nor am I prepared to say that, having that knowledge, there was this rule of interpretation to be considered. I myself do not believe that when Lord Buckmaster enunciated the rule to which I have referred, which dealt with the comparatively simple question as to what is the meaning of the word "wreck," he had in his mind anything like the present case, where the Act of Parliament of 1920 is re-enacted in rather different form in the Act of 1933, and where numberless decisions have been given as to the meaning of words in these complicated and difficult Acts. It seems to me to be really a wrong interpretation of the law if one was to assume that Parliament, when enacting an Act such as the Act of 1933, had to bear in mind every decision in the High Court which had been given as to the meaning of the various words in an earlier statute dealing with the same subject-matter. We all know that some of the cases are conflicting; they are not always absolutely in line with one another, and I think it would be quite wrong to say, in effect, that the Court of Appeal in 1947 was precluded from giving its own interpretation of these words by reason of a decision given by an inferior court in 1926 under a different statute.

If it is permissible in a case of this kind to consider public policy, it seems to me most undesirable that one division of this court should give a decision which is inconsistent with a decision given by another division of the court. As far as

(1) [1944] K. B. 718, 729.

(2) [1947] K. B. 177.

C. A.

1949

THE ROYAL COURT DERBY PORCELAIN CO. LD. *v.* RAYMOND RUSSELL.

one can, I would like to keep the law as certain as possible, and to disturb the judgment in *Braithwaite's* case (1) by reason of this somewhat technical though interesting argument, would, to my mind, be contrary to public policy, and, unless I were bound to do so, I should be unwilling to take that course. I do not feel bound to do so in this case, and for those reasons, I think that this appeal should be dismissed.

COHEN L.J. I am of the same opinion. We have had the advantage of an ingenious argument from Mr. Handforth, directed to establish, firstly, that this court in *Braithwaite's* case (1) decided it per incuriam, in that their attention had not been directed to the fundamental principle of construction to be found in the passage of Lord Buckmaster's judgment in *Barras'* case (2), which my Lord has already read; and secondly that, therefore, in accordance with principles laid down by the Master of the Rolls in *Young* v. *Bristol Aeroplane Co. Ld.* (3), we ought not to treat *Braithwaite's* case (1) as correct and are bound to place on the words now under consideration, as they appear in the Act of 1933, the construction which was placed upon them in 1926 when the Divisional Court were considering, in *Braby's* case (4), the meaning of s. 5, sub-s. 1, of the Act of 1920.

The question we have to decide is whether this case is really within the principles laid down by the Master of the Rolls in *Young* v. *Bristol Aeroplane Co. Ld.* (3). Speaking for myself, I doubt whether a rule of construction is on a par with "a statute or a rule having the force of a statute" which is the language used by the Master of the Rolls in *Young's* case (3). But assuming that "principles of "construction" is within the per incuriam principle as laid down by the Master of the Rolls, can we possibly attribute to this court ignorance, when they were considering *Braithwaite's* case (1), of the rule of construction which is to be found in *Barras'* case (2) and a number of earlier cases in which the same point arose? I find it quite impossible to attribute to the court any such ignorance. It is plain from the report that their attention was expressly directed to the decision of the Divisional Court in *Braby's* case (4), and it necessarily follows that their attention was thus directed to the terms of s. 5, sub-s. 1, of the Act of 1920; and they must, I think, have known that this section was indistinguishable in substance from the words used in the schedule to the Act of 1933. It seems to me that we must assume that this court in *Braithwaite's* case (1), after a consideration of all the relevant factors including, so far as they thought it affected the matter, the rule of construction in question, came to the conclusion that it was open to them to find, as they did, that the words "in "consequence of" in the schedule to the Act of 1933 related only to what was in the mind of the landlord, and that what was in the mind of the tenant was irrelevant.

---

(1) [1947] K. B. 177.

(2) [1933] A. C. 402.

(3) [1944] 1 K. B. 718, 729.

(4) [1926] 1 K. B. 456.

I only desire to add, though it is perhaps irrelevant to the decision, that had the matter arisen for consideration before us, free from any authority so that we were entitled to construe the matter on our own, I should myself have reached the same conclusion as that which was expressed by Morton L.J. in *Braithwaite's* case (1). For those reasons I agree that the appeal should be dismissed.

DENNING L.J. I agree. In 1947 in *Braithwaite's* case (1) this court put an interpretation on the statute and in so doing overruled *Frederick Braby & Co. Ld.* v. *Bedwell* (2), a decision in the Divisional Court which had stood since 1926. It is said that this court ought not to have overruled *Frederick Braby & Co. Ld.* v. *Bedwell* (2) because that case had previously been rendered authoritative by Parliament when it passed the Act of 1933.

I do not agree with the suggestion that this court ought not to have overruled *Frederick Braby & Co. Ld.* v. *Bedwell* (2). I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled. There was, therefore, in my opinion, no rule of law which prevented this court from overruling *Frederick Braby & Co. Ld.* v. *Bedwell* (2), and I do not agree with the contention that *Braithwaite's* case (1) was wrongly decided.

---

(1) [1947] K. B. 177. (2) [1926] 1 K. B. 456.

For those reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the tenant: *Preston, Lane-Claypon & Co., for Hollinshead and Moody, Tunstall, Stoke-on-Trent.*

Solicitors for the landlords: *Peacock and Goddard, for Moody and Woolley, Derby.*

C. G. M.

---

(1) [1947] K. B. 177.

1949
Jan. 27, 28; *Feb.* 14.

Sellers J.

STEAMSHIP "INDUNA" CO. LD. *v.* BRITISH PHOSPHATE COMMISSIONERS.

Ship—Charterparty—Demurrage—Specified daily rate of discharge of cargo—Exceptions clause—Delay in discharge due "to any other "cause beyond the charterers control"—Order in country of discharge prohibiting discharge between specified hours—Resulting delay—Order unknown to either party when contract made—Applicability of exception.

By the terms of a charterparty, the charterers undertook to discharge cargo at New Zealand ports at the rate of 1,500 tons per working day of twenty-four consecutive hours and to pay demurrage if the time allowed for discharge was exceeded. By an exception to the charterparty lay days were not to count and demurrage was not to accrue in the event of delay in discharging cargo by reason of certain named causes "or from "any other cause whatsoever beyond the control of the "charterers . . . ." At the time when the charterparty was entered into, but unknown to either charterers or shipowners, an order was in force in New Zealand which made it illegal to work between 9 p.m. and 8 a.m., and thus rendered it impossible for the ship to discharge at the prescribed rate. Delay took place as a consequence and the shipowners claimed demurrage.

Held, that as in the charterparty the intention of the parties was clearly expressed that the charterers should not be liable for delay in discharging which arose by reason of a cause beyond their control, and as at the time when the contract was made, neither party knew of the existence of the cause which would, or might, occasion delay, there was no reason why effect should not be given to that which the parties had made clear by their contract and, consequently, the lay days would not count, nor demurrage accrue, during the delay occasioned by the prohibition against night work.

ACTION.

The facts, which are more fully referred to in the judgment, were shortly as follows: By a charterparty made on April 4, 1946, and amended on May 14, 1946, the respondents, the British Phosphate Commissioners, chartered the s.s. *Loch Dee*, belonging to the claimants, Steamship "Induna" Co. Ld., to proceed to Bona and there load a cargo of phosphates to be discharged at Lyttleton and Dunedin, including Ravensbourne Wharf, New Zealand, the rate of freight to be 99*s*. 6*d*., British sterling, per ton, and the rate of discharge to be 1,500 tons per day of twenty-four consecutive hours. In accordance with the charterparty, the vessel proceeded to Bona and loaded a cargo of phosphate rock and it was agreed that there was a saving of time in loading in respect of which the charterers were entitled to 248*l*. 0*s*. 3*d*. The vessel proceeded to New Zealand and it was found by the arbitrator that in order to enable the cargo to be discharged at the rate of 1,500 tons in twenty-four consecutive hours, it would have been necessary to work in two shifts, one by day and one by night. At the time when the charterparty and the addendum were entered into, unknown to either the charterers or the shipowners, there was in existence an order of the Waterfront Control Commission of New Zealand, prohibiting work being done between 9 p.m. and 8 a.m., which made it impossible to discharge 1,500 tons in twenty-four hours. In the arbitration, the claimants claimed demurrage in respect of the delay caused by the failure of the charterers to discharge the vessel at the stipulated rate, and the respondents claimed despatch money. In answer to the claim for demurrage, the charterers relied on an express provision of the charterparty that "in the event of any delay or hindrance in . . . . "discharging cargo by reason of . . . . scarcity of labourers " . . . . intervention of constituted authorities . . . . or from "any other cause whatsoever beyond the control of the "charterers, or from the inability or inefficiency of the "ship . . . . to discharge, the lay days not to count during "the period of such delay or hindrance and demurrage not "to accrue."

A. A. Mocatta for the claimants. The shipowner's are entitled to recover in this case. The charter was a fixed time charter and the charterers must discharge within the fixed time or pay demurrage, unless delay in discharge was due to the default of the shipowners or was clearly within an exception. (See *Budgett & Co.* v. *Binnington & Co.* (1); *William Alexander & Sons* v. *Aktieselskabet Dampskibet, Hansa* (2).) Charterers cannot rely on illegality by the local law to excuse them (*Ralli Bros.* v. *Campania Naviera Sota Y Aznar* (3)), since it was not illegal to discharge at the rate of 1,500 tons per working day of twenty-four consecutive working hours (as to the meaning of which see *Turnbull, Scott & Co.* v. *W. Cruickshank & Co.* (4)), but merely illegal to work between 9 p.m. and 8 a.m. In the present case none of the express exceptions excuses the charterers, since, although the events that in fact occurred might, prima facie, be covered by the wording of the exceptions clause and in particular by the words "or from any cause whatsoever "beyond the control of the charterers," exceptions in general, and that provision in particular, do not exempt from liability, when the event relied on, in this case the local law, was in operation at the date of the contract: see *France, Fenwick* v. *Spackman and Sons* (5); Scrutton on Charterparties, 15th ed., p. 237, n. (K) and 10th ed., p. 236; and *Ciampa* v. *British India Steam Navigation Co.* (6). To bring the exceptions into operation there must be some supervening event, and, therefore, it is immaterial, as found or agreed in the present case, that neither party knew of the existence of the local law at the time when the contract was made. Knowledge was not material to the decision in *Ciampa's* case (6). (See Halsbury's Laws of England, 2nd ed., vol. 20, p. 321, n. (O), where the effect of that case is correctly summarized.)

Eustace Roskill for the respondents. It was impossible for the ship to discharge at the stipulated rate and the charterers are excused from liability for demurrage on four grounds: (1.) by the words in the charterparty "inability "or inefficiency of the ship" which mean more than the physical capacity of the ship; (2.) because, unknown to both parties at the time of the contract, they contracted to do something which was impossible, and such a promise will not

---

(1) [1891] 1 Q. B. 35.
(2) [1920] A. C. 88, 94.
(3) [1920] 2 K. B. 287.
(4) (1905) 7 Fraser 265.
(5) (1912) 18 Com. Cas. 52.
(6) [1915] 2 K. B. 774.

1949

STEAMSHIP "INDUNA" CO., LD. *v.* BRITISH PHOSPHATE COMMISSIONERS.

be enforced (see Leake on Contracts, 8th ed., pp. 513, 516, 518; and *Ashcroft* v. *Crow Orchard Colliery Co.* (1)); (3.) because the case is covered by the decision in *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* (2); and (4.) in any event by the words of the exception "or from any cause whatsoever "beyond the control of the charterers" and possibly also by the words "intervention of the constituted authorities" and "scarcity of labour." The passage from *France, Fenwick* v. *Spackman* (3) relied on by the claimants was obiter and has never been followed or even cited, and *Ciampa* v. *British India Steam Navigation Co.* (4) turned on the fact that the shipowners put into Marseilles with knowledge of the local law in force: see *Taylor* v. *Lewis Ld.* (5); *Safadi* v. *Western Assurance Co.* (6); Scrutton on Charterparties, 15th ed., p. 237, n. (K). The contrary statement at p. 244 did not appear in the last edition for which Scrutton and MacKinnon L.JJ. were responsible, though it has the authority of Lord Porter in the 13th ed. (He also referred to *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (7) and *Watson Brothers Shipping Co. Ld.* v. *Mysore Manganese Co. Ld.* (8).)

A. A. Mocatta in reply.

Cur. adv. vult.

Feb. 14. SELLERS J. The parties in this case submitted the matters in issue between them to arbitration. The arbitrator made an award in the form of a special case, which came before the court for hearing in April, 1948. During the argument it became apparent that it was desirable, and, indeed, necessary, for the proper determination of the matter to have further facts found, and the award was, by order of the court, referred back to the arbitrator. The further information required is contained in a supplemental award, and it is apparent that the inevitable delay in getting evidence from New Zealand has been justified, as the facts now revealed show that the original case required to be altered and supplemented to bring the true position before the court, and the legal issues

(1) (1874) L. R. 9 Q. B. 540.
(2) [1920] 2 K. B. 287.
(3) 18 Com. Cas. 52.
(4) [1915] 2 K. B. 774.
(5) (1927) 28 Ll. L. R. 329, 332.
(6) (1933) 46 Ll. L. R. 140, 143.
(7) [1919] A. C. 1.
(8) (1910) 15 Com. Cas. 159.

which have been raised on the further hearing have been different from those which were originally argued.

In the arbitration the claimants, as owners of the s.s. *Loch Dee*, claimed demurrage, and the respondents, as charterers, resisted the claim and claimed despatch money. The respective claims depend on the true effect of certain provisions or exceptions of the charterparty and their application to the facts found by the arbitrator.

The special case shows that the original charterparty of April 4, 1946, was altered on May 14, 1946, and it was then agreed that the s.s. *Loch Dee* should discharge at Lyttleton and Dunedin, including Ravensbourne Wharf, New Zealand, the rate of freight to be 99*s.* 6*d.* per ton British sterling, and the rate of discharge to be 1,500 tons per day: all other terms, conditions and exceptions of the charterparty to remain unaltered.

In accordance with the charterparty, the vessel loaded at Bona a cargo of phosphate rock. It was established and agreed that there was a saving of time in loading for which 248*l.* 0*s.* 3*d.* is due to the charterers. The dispute between the parties is whether the charterers are liable for demurrage in respect of the discharge against which they can set off the despatch money, as the loading and discharging times are admittedly reversible. The original contract provided for discharge in one or two of certain specified Australian ports at the average rate of 750 tons per working day of twenty-four consecutive hours. The alteration to the New Zealand ports not only increased the rate of freight, but, most surprisingly in view of the facts now known, doubled the rate of discharge.

The facts found by the arbitrator in the supplemental award established that it was not possible for the *Loch Dee* to have discharged 1,500 tons per day if discharge took place only between 8 a.m. and 5 p.m. There is no express finding, but the clear inference is that it would not have been possible if overtime had been worked to 9 p.m. What was necessary, if the vessel was to discharge 1,500 tons in twenty-four consecutive hours, was to work in two shifts, one by day and one by night, as had apparently been the practice in the war period. So to do, when the ship arrived at the respective ports of discharge, was illegal. Before me it was agreed that when the charterparty and the addendum were entered into neither the shipowners nor the charterers knew that an order of the Waterfront Control Commission of New Zealand prohibited work being done between 9 p.m. and 8 a.m., but in fact it was so. The order did not make it illegal to discharge 1,500 tons, or any other quantity, in twenty-four hours, but the prohibition of night work made it impossible for the ship to discharge at that rate. The vital question which has arisen, therefore, is whether in the circumstances and under the charterparty the lay days are to be held to run notwithstanding the prohibition with regard to night work.

The obligation of the charterers was to discharge at the rate of 1,500 tons per working day of twenty-four consecutive hours (provided the ship could put it out), subject to the stipulated exceptions, or to pay demurrage as provided by cl. 11.

The charterers relied on the express provision that in the event of any delay or hindrance in discharging cargo by reason of scarcity of labourers, intervention of constituted authorities, or from any other cause whatsoever beyond the control of the charterers, or from inability or inefficiency of the ship to discharge, the lay days were not to count during the period of such delay or hindrance and demurrage was not to accrue.

There was undoubtedly delay from the inability to work the ship at night, because of the order which prohibited night work at the ports in question, and that delay was due to a cause beyond the control of the charterers. It might also be said to be caused by the intervention of constituted authorities. The original argument that the delay was due to "scarcity of labourers" became immaterial on the new findings of fact and was not further pursued but was kept open.

On behalf of the shipowners it was contended that the exceptions so relied on do not operate to prevent the lay days running, because the exceptions only apply to some exceptional or abnormal circumstances arising or supervening after the making of the contract. The prohibition of night work, it was said, existed at the time the parties made their contract and no night work was the ordinary practice ruling at the port.

I was referred to Rowlatt J.'s judgment in *Ciampa and Others* v. *British & India Steam Navigation Co. Ld.* (1), and particularly to the passage where he says: "I am not deciding

---

(1) [1915] 2 K. B. 774, 779.

"that the application of the ordinary law of a country may "not in some cases constitute a 'restraint of princes,' but I "think the facts which bring that law into operation must "be facts which have supervened after the ship has started "on the voyage in question. When facts exist which show "conclusively that the ship was inevitably doomed before "the commencement of the voyage to become subject to a "a restraint, I do not think that there is a 'restraint of "'princes'."

I was also referred to the observations of Bailhache J. in *France, Fenwick & Co.* v. *Spackman & Sons* (1). He said: "If I had not found that the circumstances at the time of "the discharge were exceptional, I should have acceded to "Mr. Roche's argument that to bring themselves within "the exceptions clause it is not enough for the defendants "to say that they were prevented, but that they must say "that they were prevented by some cause which was "exceptional. If a person contracts to discharge in thirty-six "hours unless prevented by some cause beyond his control, "and if the cause beyond his control always would prevent "the discharge within that time then, in my opinion, it is not "an exception at all, and if in such a case he fails to discharge "within the thirty-six hours he is not within the exceptions "clause."

I doubt whether either learned judge was intending to lay down any general principle. The observations were, I think, directed to the facts and circumstances of the respective cases. In *Ciampa and Others* v. *British & India Steam Navigation Co. Ld.* (2), the shipowners knew of the regulations in force at Marseilles, their ships had frequently been subjected to the process of fumigation there, and the learned judge found that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint.

In neither of these two cases does any argument appear to have arisen on the position where both contracting parties are ignorant of the existing circumstances which when the vessel arrived occasioned delay. In *Ciampa and Others* v. *British India Steam Navigation Co. Ld.* (2), the shipowners knew the circumstances. In *France, Fenwick & Co.* v. *Spackman & Sons* (1) the decision turned on a finding of exceptional circumstances. The authorities establish that the obligation of the charterers to pay demurrage after the

(1) 18 Com. Cas. 52, 57.

(2) [1915] 2 K. B. 774, 779.

expiry of the lay days is absolute, where lay days and demurrage are stipulated, unless the circumstances of the delay are covered by exceptions in the charterparty, or arise through the fault of the shipowner, or from the loading or unloading being illegal by the law of the place where it has to be performed.

In the present charterparty, the parties have made it clear that lay days are not to count where delay in discharging arises by reason of a cause beyond the charterers' control and demurrage for such period will not accrue. The intention of the parties is clearly expressed. If both parties, or one of the parties, knew at the time of making the contract of existing circumstances which would or might occasion delay other considerations would arise, but where neither party knew, as here, I see no reason why effect should not be given to that which they have made clear by their contract. If parties are contracting on the basis of a state of affairs known to them, or which it can be shown they were prepared to accept, then an exception relating to something outside their control would no doubt be construed to relate to some circumstances or event not so known or something outside the basis of their bargain, that is, something exceptional or abnormal in comparison with the contemplated state of affairs. In the present case the parties contemplated that 1,500 tons could be discharged in a working day of twenty-four hours. The prohibition upset that basis, and in that sense the circumstances were exceptional and abnormal. In this contract there are exceptions dealing with delay by reason of ice, epidemics, labour or political disturbances. Any one of these might, in given circumstances, be proved to have existed at the time the contract was made, but if the circumstances were unknown to the parties it seems to me that they could be relied on if they existed and caused delay when the vessel arrived for loading or discharge. In recent years regulations have come into operation in our own country restricting and regulating trade over wide spheres of industry, and often with but little publicity. It would restrict the incidence of these exceptions to a very great extent, and would, in my opinion, defeat the obvious intention of the parties, if the exceptions could be rendered ineffective by establishing that, unknown to the parties, the circumstances relied on existed a day or two, or even an hour or two, before the contract was entered into.

So far as this contract is concerned, and in the circumstances of this case, I am of opinion that the charterers' contention is right, that the lay days do not count during the period when night work was not performed by reason of the prohibition.

The charterers also contended that by reason of the prohibition the ship was not able to fulfil her obligation to put out 1,500 tons in twenty-four consecutive hours and that there was inability or inefficiency of the ship to discharge. Notwithstanding the argument that cl. 22 of the charterparty should be read in conjunction with these stipulations, I feel that the words are covered by the authority of *Wm. Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (1), and that they have reference to the structural capacity and equipment of the ship, and the arbitrator has found that the *Loch Dee* was capable of discharging 1,500 tons in a working day of twenty-four consecutive hours.

The case of *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* (2), was quoted to support an argument that the illegality of night discharging could be relied on. In my opinion that case has no application. The contract provided for discharge at the rate of 1,500 tons per working day of twenty-four hours, and it was not illegal to discharge at that rate if it could have been done.

It was conceded at the hearing before me that in so far as overtime was not worked between 5 p.m. and 9 p.m. the charterers were entitled to rely on one at least of the exceptions and that the lay days do not count during such period.

The effect of the conclusion at which I have arrived is that the charterers are not liable for any demurrage but are entitled to despatch money amounting to 248*l*. 0*s*. 3*d*. on loading and to a further 58*l*. 7*s*. 1*d*. on discharging, and are, therefore, entitled to an award for 306*l*. 7*s*. 4*d*. on the terms indicated in para. 21 of the special case.

Judgment for respondents.

Solicitors for the claimants: *Holman, Fenwick and Willan.*
Solicitors for the respondents: *Middleton, Lewis & Clarke.*

---

(1) [1920] A. C. 88.

(2) [1920] K. B. 287.

P. B. D.

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

1949
Apr. 28, 29.

Lord Goddard C.J., Birkett and Lynskey JJ.

Local government—Compulsory acquisition of land—Compensation—Agricultural land—Development restricted by Town and Country Planning Act, 1947*—Notice to treat after Act passed but before appointed day for operation of Act—Permanent restriction against development to be assumed—Amenity value of land—Acquisition of Land* (*Assessment of Compensation*) *Act,* 1919 (9 *&* 10 *Geo.* 5 *c.* 57) *s.* 2, *sub-s.* 2—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 55, *sch. III.*

Section 55 of the Town and Country Planning Act, 1947, modifies the rules which are to be followed by an official arbitrator under s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, in assessing compensation in respect of land compulsorily acquired for public purposes, where the land shall be so acquired in pursuance of a notice to treat served after the passing of the Act of 1947 (on August 6, 1947) and before the appointed day (July 1, 1948) on which the main provisions of that Act came into force. By sub-s. 2 of s. 55, the value of any interest in such land " shall be ascertained by reference to prices current immediately " before January 7, 1947," and by sub-s. 3, in calculating such value, " it shall be assumed that the land was, at the time of the " notice to treat, subject to a permanent restriction prohibiting " the carrying out thereon of any development other than develop- " ment of the classes specified in sch. III to this Act." Section 12, sub-s. 2, of the Act defined " developments " as including (subject to certain exceptions in a proviso) " the carrying out of building " . . . . operations . . . . on . . . . land, or the making of any " material change in the use of any buildings or other land." Schedule III to the Act specifies certain classes of development including (part II., para. 4) " the carrying out, on land . . . . " used for the purposes of agriculture or forestry . . . . of any " building or other operations required for the purposes of that " use," subject to certain excepted operations.

A county council were authorized under the Education Act, 1944, compulsorily to acquire land forming part of a field, and served notice to treat on the owners on February 27, 1948. An official arbitrator found that at all material times the land was being used for agricultural purposes; that it could not practicably have been put to any other use covered by sch. III to the Act of 1947; that there were no buildings thereon; and that the value of the land for agricultural purposes ascertained by reference to prices current immediately before January 7, 1947, was agreed at 17*l.*

Held, (1.) that, by s. 55, sub-s. 3, of the Act of 1947, the arbitrator must assume, in calculating the value of the land for the purpose of assessing compensation, that no development of it, other than development of the classes specified in sch. III, could ever take place; (2.) that, on that assumption, the land had no special inducement or amenity value to owners of neighbouring property who might wish to secure its control or to prevent its development, since the arbitrator had found that it could not practicably have been put to any other use covered by sch. III; and (3.) that, as a matter of law, the arbitrator should therefore award the owners of the land 17*l.* compensation.

CASE STATED by official arbitrator.

The arbitrator found the following facts:—

(1.) By a compulsory purchase order made by Nottinghamshire County Council under the powers of the Education Act, 1944, on March 20, 1947, and confirmed by the Minister of Education on May 14, 1947, the said council was authorized to acquire compulsorily certain lands in the Parish of Ruddington in the County of Nottinghamshire, including a piece of land having an area of 498 square yards with a frontage of thirty-eight feet to Station Road, a highway repairable by the inhabitants at large.

(2.) The said land forms part of a field owned by the claimants.

(3.) The council duly served notice to treat upon the claimants on February 27, 1948, and the claimants duly submitted a claim for 249*l.*, subsequently reduced to 124*l.*, as the value of the said land in fee simple. No claim was submitted for compensation for severance, injurious affection or disturbance.

(4.) At all material times the said land was being used for agricultural purposes. It could not practicably have been put to any other use covered by sch. III to the Town and Country Planning Act, 1947. There are no buildings thereon.

(5.) The said land is immediately adjacent to the western boundary of a plot of land purchased by a cinema undertaking from the claimants in 1939 with the intention of erecting a cinema thereon. This development did not in fact take place as the site was requisitioned and a nursery school was erected thereon which was and is in use by the council. The said plot was included in the compulsory purchase order above referred to and the said land was required by the council as an extension to the site of the said school.

(6.) The value of the said land for agricultural purposes ascertained by reference to prices current immediately before January 7, 1947, was agreed at 17*l.*

(7.) Before August 6, 1947, the date of the Royal Assent

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

to the Act of 1947, the land had a substantial building value for development as part of a potential building estate and would have sold readily in the anticipation that planning permission for the development of it and the adjoining land of the claimants would not be indefinitely refused.

(8.) At the rear of the said land though not immediately contiguous thereto are a few good class houses the amenities of which might be affected if the said land was built upon.

The amount of compensation claimed by the claimants was disputed by the council, and that dispute was referred under the Acquisition of Land (Assessment of Compensation) Act, 1919, to an official arbitrator.

The parties agreed that the compensation must be assessed in accordance with the provisions of that Act as modified by s. 55 of the Town and Country Planning Act, 1947 (1).

---

(1) Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1, provides for the assessment by official arbitrators of compensation in respect of land acquired compulsorily for public purposes. Section 2: "In assessing com-"pensation, an official arbitrator "shall act in accordance with the "following rules: . . . . (2.) The "value of land shall, subject as "hereinafter provided be taken to "be the amount which the land if "sold in the open market by a "willing seller might be expected "to realise . . . ."

Town and Country Planning Act, 1947, Part III, s. 12, sub-s. 1: "Subject to the provisions of this "section and to the following pro-"visions of this Act, permission "shall be required under this Part "of this Act in respect of any "development of land which is "carried out after the appointed "day." Sub-s. 2: "In this Act, "except where the context other-"wise requires, the expression "'development' means the carry-"ing out of building, engineering, "mining or other operations in, "on, over or under land, or the "making of any material change "in the use of any buildings or "other land:

"Provided that the following "operations or uses of land shall "not be deemed for the purposes "of this Act to involve develop-"ment of the land, that is to say: ". . . .

"(*d*) the use of any build-"ings or other land within the "curtilage of a dwelling-house "for any purpose incidental to "the enjoyment of the dwelling-"house as such; . . . ."

Part V (ss. 50 to 57) amends the law relating to compensation on the compulsory acquisition of land.

Section 51, sub-s. 1: "Any "compensation payable in respect "of the compulsory acquisition of "an interest in land by a govern-"ment department or a local or "public authority within the "meaning of the Acquisition of "Land (Assessment of Compensa-"tion) Act, 1919, in pursuance of "a notice to treat served on or "after the appointed day . . . . "shall be assessed in accordance "with the provisions of that Act "as modified by the provisions of "this and the three next following "sections. Sub-s. 2: "The value

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

The claimants contended (i) that, on the true construction of s. 55 of the Act of 1947, the arbitrator, in assessing compensation, must have regard to the price which would have been obtained for the land if sold in the open market at the date of the notice to treat, subject to the necessity for obtaining permission to develop it under that Act, but in the belief that such permission would not be indefinitely withheld and, alternatively (ii) that in any event the inducement or amenity value of the land to an owner of neighbouring property, in order to secure control of it and prevent its development, must be taken into account.

The council contended that, on the true construction of s. 55, 17*l*., the agreed value of the land for agricultural purposes, was the sum which should be awarded.

The official arbitrator stated a special case in which he left for the opinion of the court the question whether, as a matter of law, he must award the sum of 17*l*. compensation to the claimants, or whether they were entitled to a greater sum.

C. N. Shawcross K.C. and *Lord Vaughan* for the claimants. Section 55, sub-s. 3, of the Town and Country Planning Act, 1947, expressly provides that sub-s. 2 of s. 51 of that Act

"of any such interest shall be ascertained on the assumption that planning permission would be granted under Part III of this Act for development of any class specified in sch. III to this Act, but would not be so granted for any other development." Then follow certain provisoes to cover cases in which other compensation has already become payable under other sections of the Act.

Section 55, sub-s. 1: "Subject to the provisions of this section, the foregoing provisions of this Part of this Act shall apply in relation to land compulsorily acquired in pursuance of a notice to treat served after the passing of this Act and before the appointed day as they apply in relation to land compulsorily acquired in pursuance of a notice to treat served after the appointed day; ...." Sub-s. 2: "The value of any interest in land which is compulsorily acquired as aforesaid shall be ascertained by reference to prices current immediately before January 7, 1947, and for that purpose the interest shall be deemed to have been subsisting immediately before that day subject to all incidents to which it is subject on the date of the notice to treat, and the land shall be deemed to have been immediately before the said January 7 in the same state as it is at the date of the notice to treat."

Sub-s. 3: "Subsections 2 to 6 of s. 51 of this Act shall not apply to any interest in land which is compulsorily acquired as aforesaid, but in calculating the value of any such interest it shall be assumed that the land was, at the time of the notice to treat, subject to a permanent

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

is not to apply in such a case as the present. Section 51, sub-s. 2, provides (subject to certain provisoes) for land to be valued on the assumption that planning permission would not be granted for any development except of the classes specified in sch. III to the Act. Section 55, sub-s. 3, is in terms far removed from the terms of s. 51, sub-s. 2, and is clearly intended to have an effect different from that of s. 51, sub-s. 2. By s. 55, sub-s. 3, the land is to be valued on the assumption that it is "subject to a permanent restriction" against development not within sch. III. But that cannot mean that it is to be assumed that planning permission for development will never be granted. "Permanent" does not mean "perpetual." It is simply used as the antithesis to "temporary"; it means "indefinite." The fact that the land is under a "permanent" restriction, in that sense, against development does not preclude a potential purchaser from assuming that, at some future date, he will be granted permission to develop it. The claimants are therefore entitled to such sum as a prospective purchaser would have been willing to pay for the land at the date of the notice to treat, in the belief that permission to develop it would not be indefinitely withheld.

Even if that point fails the claimants are entitled to

"restriction prohibiting the carrying out thereon of any development other than development of the classes specified in sch. III to this Act; and for the purposes of this provision, s. 12 of this Act and the said sch. III shall have effect as if for the references therein to the appointed day there were substituted references to the date of the notice to treat."

Section 119, sub-s. 1, defined "appointed day" as such day as "the Minister" of Town and Country Planning "may by order appoint."

Section 120, sub-s. 2: "This Act shall come into force on the appointed day: Provided that . . . . (*c*) Part V of this Act shall come into force on the date of the passing of this Act [August 6, 1947]."

Schedule III, part II, para. 4: "The carrying out, on land which was used for the purposes of agriculture or forestry on the appointed day, of any building or other operations required for the purposes of that use, other than operations for the erection, enlargement, improvement or alteration of dwelling-houses or of buildings used for the purposes of market gardens, nursery grounds or timber yards or for other purposes not connected with general farming operations or with the cultivation or felling of trees."

By the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (St.I. 213), the Minister of Town and Country Planning appointed July 1, 1948, as the "appointed day."

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

something in addition to 17*l.* in respect of the amenity value of the land: see *Pointe Gourde Quarrying and Transport Co. Ld.* v. *Sub-Intendent of Crown Lands* (1). The land had an additional value to the owners of adjacent land who might wish to prevent its development. It is possible that it might be used as a children's playground, or that someone may be given permission to build on it. In any case the arbitrator should have taken into account the possibility of development which was permitted by the proviso to s. 12, sub-s. 2, of the Act and development which fell within the classes specified in sch. III. An owner of contiguous land might obtain permission to build a house on his land and acquire the land in question. He might thus bring it within the curtilage of the house, a use authorized by s. 12, sub-s. 2 (*d*). By s. 119, sub-s. 1, "agricultural" includes horticultural. The land could be used, without permission, as an ornamental garden, or a forest could be planted on it.

Michael Rowe K.C. and *G. D. Squibb* for the council. As regards the claimants' main point, that a special meaning must be given to s. 55, sub-s. 3, of the Act of 1947 to distinguish it from s. 51, sub-s. 2, one cannot disregard the plain meaning of words of s. 55, sub-s. 3. "Permanent" means permanent. It is conceded that it means "which will last indefinitely," that is to say, "which is to stand." That is the sense in which the arbitrator used the word "indefinitely" in cl. 7 of his findings. The official arbitrator must assume that permission to develop the land would not be granted.

As regards the claimants' second point it must again be assumed that development would be prohibited. The land has no additional value to a purchaser wishing to prevent its development because, ex hypothesi, it cannot be developed whether he buys it or not. It cannot be used as a forest because, under para. 4 of sch. III, one can only plant trees on it if it is already used for the purposes of forestry. It is conceded that, theoretically, farm buildings might be built on it under that paragraph, but the arbitrator has found that it was part of a field (cl. 2 of his findings) and could not practicably be put to any other use covered by sch. III (cl. 4).

Shawcross K.C. replied.

LORD GODDARD C.J. The compensation in this case has to be assessed in accordance with the provisions of the

---

(1) [1947] A. C. 565.

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

Lord Goddard C.J.

Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the novel and, in some respects, far-reaching provisions of the Town and Country Planning Act, 1947.

That Act received the Royal Assent on August 6, 1947, the Bill having been introduced into Parliament in January, 1947. That has a certain bearing on the present case, because provision is made in the Act that, for certain purposes, regard should be had to the position immediately before January 7, 1947, when the Act was introduced, to prevent the use of land being changed to give it an enhanced value between those two dates.

By s. 12, sub-s. 1, of the Act, before one may develop any land after the " appointed day " (July 1, 1948) permission to do so must be obtained from the appropriate authority, and by s. 12, sub-s. 2, any change in the use of land is regarded as " development." Section 51 modifies the power of an official arbitrator under s. 2, sub-s. 2, of the Act of 1919 simply to give by way of compensation what a willing seller would obtain in the market, where land is compulsorily acquired " in pursuance of a notice to treat served on or after the " appointed day." Section 55 of the Act of 1947 provides for the state of affairs where the notice to treat is served after the passing on August 6, 1947, of that Act, but before the " appointed day " (July 1, 1948), when the main provisions of the Act came into force, and it is that transitory provision which applies in the present case.

The first point which was taken by Mr. Shawcross was that, by s. 55, sub-s. 3, of the Act, s. 51, sub-s. 2, is made not to apply to such a case as the present, and that we ought to give some different meaning to s. 55, sub-s. 3, to that which we would give to s. 51, sub-s. 2. I would mention that sub-s. 2 of s. 51 is a very long sub-section; it contains two long provisoes. I think the draftsman might well have said in s. 55, sub-s. 3, " the provisoes to sub-s. 2 of s. 51 shall " not apply " to such a case as the present. He in fact said that (inter alia) the whole sub-section should not apply, and then went on to say what principle was to be used in calculating the value of the land: " In calculating the value " of any such interest it shall be assumed that the land was, " at the time of the notice to treat, subject to a permanent " restriction prohibiting the carrying out thereon of any " development other than development of the classes specified " in sch. III to this Act." We were in effect asked to read the

1949

EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL.

Lord Goddard C.J.

word " permanent " in that context as meaning, indefinite but temporary. I think that it is quite clear that what sub-s. 3 of s. 55 means is that the arbitrator must fix the value of the land on the assumption that development, other than development of the classes specified in sch. III, will not be permitted. It is to be assumed that the land is subject to a permanent restriction against such development, and if there is a permanent restriction against development of the land, no development can ever take place. That is the first thing which I think has to be borne in mind. Section 53, sub-s. 3, finally provides that, " for the purposes of this provision, " s. 12 of this Act and the said sch. III shall have effect as " if for the references therein to the appointed day there " were substituted references to the date of the notice to treat." The sub-section therefore seems to me to mean no more and no less than this, that the arbitrator must assume that land, in respect of which a notice to treat has been served, cannot (subject to sch. III) be developed without permission after the date of the notice to treat. That restriction is permanent. If the use of the land had been altered between January 7, 1947, and the date of the notice to treat, the arbitrator would, as it seems to me, have had to calculate what the value of the land would have been on January 7, 1947, if it had then been used in the way in which it was being used at the time of the notice to treat.

In the present case the land was used for agricultural purposes on both those dates, and the arbitrator has found that the value of the land for agricultural purposes, ascertained by reference to the prices current immediately before January 7, 1947, was agreed to be 17*l.* That being so, it seems to me that the sections to which I have referred show that the utmost compensation which can be payable, subject to Mr. Shawcross' second point, is 17*l.*; the agricultural value of the land. The policy of the Act, with which, of course, we are in no way concerned, is that a person who is, compulsorily selling land is not to receive any increased value which it may bear on account of its being what is sometimes called " ripe for development," or because it may become ripe for development. The owner is to get the value of the land having regard to the use to which it has been put, and assuming that it will always be put to that use.

Mr. Shawcross' second point, which he described as his subsidiary point, was that it was legitimate to increase the sum of 17*l.* by such additional sum as might be paid by an owner of contiguous neighbouring property in order to secure control and prevent development of the land in question. The plan, which has been made part of the case stated, shows that there are some houses in the neighbourhood, and it also shows the proposed site of a cinema which was to be erected close by. Mr. Shawcross contended that, in January, 1947, an adjoining owner, one of the owners of one of those houses, or the prospective proprietor of the cinema, might have been willing to pay some additional sum to get control of the land in question; it might have been an additional advantage to him to get such control. The arbitrator has found with regard to that: "(4.) At all material times the said land "was being used for agricultural purposes. It could not "practicably have been put to any other use covered by "sch. III to the Town and Country Planning Act, 1947. "There are no buildings thereon." It is plain that, as the land must be assumed to be subject to a "permanent" restriction, in the sense which I have just described, against any development except development of a class specified in sch. III, and as the arbitrator has found that it could not practicably have been put to any other use covered by that schedule, it must be assumed that it will in any event remain agricultural land, and it can therefore have no value in excess of 17*l.* to an owner of neighbouring property.

But, as I understand the argument which has been addressed to us in support of the contention that some additional sum should be awarded, it was said that an owner of neighbouring property might bring the land within the curtilage of a dwelling-house, because he might put up a dwelling-house on adjacent land which was not subject to restriction, or for the development of which permission could be obtained, and that the land in question could be brought within the curtilage of that dwelling-house, and that, by s. 12, sub-s. 2 (*d*), that would not be a "development" within the meaning of the Act. I think that that argument is fallacious, because once such an owner brought the land, which is at present agricultural land, within the curtilage of his dwelling-house, so that it became part of the dwelling-house, he would be altering the use of the land, and that is prohibited by s. 12, sub-s. 1. I think, therefore, that the arbitrator should not add anything to the value of the land on account of that consideration.

As a matter of law, therefore, the arbitrator should award the claimants the sum of 17*l.* and the case must go back to him with that intimation.

Birkett J. I agree.

Lynskey J. I also agree. I would only like to add that by s. 12, sub-s. 1, of the Act of 1947 the development of land without permission is prohibited, subject to the proviso in sub-s. 2 setting out a number of operations in relation to land which do not come within the definition of the word " development " and which can therefore take place without permission. They are restricted and only apply to particular types of works including, in one case (sub-s. 2, proviso (*d*)) " the use of any buildings or other land within the curtilage " of a dwelling-house for any purpose incidental to the " enjoyment of the dwelling-house as such."

I entirely agree with my Lord as to the interpretation of s. 55; that section in effect provides that the land must be valued at prices current immediately before January 7, 1947, but in relation to the condition which it was in and the incidents to which it was subject at the date of the notice to treat. Sub-section 3 provides: " Sub-sections 2 to 6 of s. 51 " of this Act shall not apply to any interest in land which is " compulsorily acquired as aforesaid, but in calculating the " value of any such interest it shall be assumed that the land " was, at the time of the notice to treat, subject to a permanent " restriction prohibiting the carrying out thereon of any " development other than development of the classes specified " in sch. III to this Act." I agree that, in valuing the land, it must be valued on the assumption that at the time of the notice to treat there is a permanent restriction prohibiting the carrying on of any development except of the classes specified in sch. III. It being agricultural land, it must be valued upon the basis that it is used for agricultural purposes, and that an alteration in the use of the land itself, or by building upon it, will not be allowed by those having authority to give permission for such development under the Act.

I want particularly to make it clear that I am not myself deciding in the present case that, as regards the subsidiary point taken by Mr. Shawcross, the " amenity " value of the land must be ignored in all cases. It seems to me that in applying s. 55, sub-s. 3, one has to assume the impossibility of " development " within the terms of the Act, other than development of the classes specified in sch. III. I can quite imagine cases where there would be a possibility of development of the classes specified in sch. III to the Act which might be highly objectionable to owners of adjacent land, or if their land was agricultural, which might be highly desirable to them. Under those circumstances it might well be that, when the land came to be valued, it should be given a value in excess of its purely agricultural value. It might have an "amenity" value or what is sometimes called an "inducement" value. If such facts existed in the circumstances of the present case, I personally would be inclined to say that the arbitrator would have to take notice of them. But when one looks at the facts as found in the case stated one finds that the arbitrator has found as a fact (para. (4)) that the land could not practicably have been put to any other use permitted by sch. III to the Act, and that there are no buildings on it. In view of that finding of fact Mr. Shawcross' second argument on this point fails and I agree with the views expressed by my Lord.

LORD GODDARD C.J. I should like to add to my judgment that, in dealing with Mr. Shawcross' second point, I meant to confine myself to the facts of the present case, and not to give any opinion as to what might be the position were the facts different. I quite agree with Lynskey J.'s observations on the present case.

Judgment accordingly.

Solicitors for claimants: *Johnson, Weatherall and Sturt, for Acton, Simpson and Hanson, Nottingham.*

Solicitors for council: *Sharpe, Pritchard & Co., for K. Tweedale Meaby, Nottingham.*

R. P. C.

JAMES BIBBY LD. *v.* WOODS AND HOWARD.

1949
May 5.

Lord Goddard C.J., Birkett and Lynskey JJ.

Practice—Solicitor—Garnishee proceedings—Solicitor claims lien on debt for costs—No charging order—Garnishee order made absolute—Right of judgment debtor to appeal—R. S. C. 1883 *Or.* 45, *r.* 5.

Judgment creditors, having obtained a garnishee order nisi, applied for a garnishee order absolute for the attachment of money which the garnishee had agreed to pay to the judgment debtor in settlement of cross-claims between the judgment debtor and the garnishee. At the hearing of that application before a district registrar the judgment debtor's solicitor, for the first time, claimed a lien on that money for his costs in the proceedings between the judgment debtor and the garnishee, on the ground that he was entitled to a charging order in respect of it. The registrar nevertheless made the garnishee order absolute. The judgment debtor appealed.

Held, (1) that had the solicitor obtained a charging order from a court in respect of the money before the hearing of the application for the garnishee order absolute his charge would have taken precedence over the judgment creditors' claim and, if the solicitor's claim had been disputed, the registrar would have been bound to direct an inquiry under Or. 45, r. 5; but (2) that, as the solicitor had no lien stricto sensu on the money, and as he had failed to apply for a charging order, the registrar was right in making the garnishee order absolute.

Shippey v. *Grey* (1880) 49 L. J. (Q. B.) 524, distinguished.

Dictum of Cockburn C.J. in *Mercer* v. *Graves* (1872) L. R. 7 Q. B. 499, 503, approved in *Mason* v. *Mason* [1933] P. 199, 205, 214, applied.

Quaere, whether, in any event, the judgment debtor had any right to bring the appeal in question since only his solicitor, not he himself, was adversely affected by the garnishee order absolute.

APPEAL from a district registrar who made a garnishee order absolute.

William Howard (the garnishee) was in partnership with Thomas Edward Woods (the judgment debtor). The partnership was dissolved and, differences having arisen between the judgment debtor and the garnishee, they began actions against each other in the Court of Passage, and in the county court, at Liverpool. Those actions were compromised on the terms that the garnishee paid to the judgment debtor the sum of 90*l*.

The judgment creditors, James Bibby Ld., obtained judgment against the judgment debtor and applied for the attachment of the debt of 90*l*. owed by the garnishee to the judgment debtor. On February 25, 1949, the judgment creditors obtained a garnishee order nisi, and on February 28 the solicitor of the judgment debtor heard of that order. The judgment creditors applied to the district registrar at Liverpool for that order to be made absolute. At the hearing of that application the judgment debtor's solicitor, by the judgment debtor's counsel, claimed for the first time that he had a lien on the debt of 90*l*. for his costs in the proceedings between the judgment debtor and the garnishee. The registrar made the garnishee order absolute on March 4, 1949.

The judgment debtor appealed to Birkett J. in chambers under R. S. C. Or. 35, r. 9. Birkett J. dismissed that appeal, holding that he had no jurisdiction to entertain the appeal under Or. 35, r. 9, and that it should have been to the Divisional Court under Or. 54, r. 22A.

The judgment debtor now appealed to the Divisional Court against the order of the registrar.

Craine for the judgment debtor. The judgment debtor's solicitor claimed to have a lien on the 90*l.* at the hearing of the application for the garnishee order absolute. That being so the registrar ought not to have made the order absolute. He ought, on the other hand, to have ordered an inquiry under R. S. C. Or. 45, r. 5. The question whether or not the solicitor in fact had a lien on the money could then be determined at the inquiry.

In fact the solicitor had a lien on the money. He was entitled to a charging order in respect of it, *Campbell* v. *Campbell* (1). He was therefore entitled to have his interest in the money protected in the garnishee proceedings, *Roberts* v. *Death* (2).

[LORD GODDARD C.J. But the right to apply for a charging order is not a lien, *Mason* v. *Mason* (3). And the solicitor had not in fact applied for a charging order.]

That did not matter. The solicitor's right was prior to that of the judgment creditors and it could not be defeated simply by his failure to obtain a charging order, *Shippey* v. *Grey* (4). Until the solicitor heard of the garnishee proceedings there was no necessity for him to obtain a charging order. It is questionable whether he then had time to obtain one before the garnishee order was made absolute. It is inequitable, therefore, that the judgment creditors should have had a right to the 90*l.* prior to that of the solicitor. [He referred also to *Faithfull* v. *Ewen* (5); *Dallow* v. *Garrold* (6); and *Cole* v. *Eley* (7).]

The judgment creditors and the garnishee did not appear and were not represented.

LORD GODDARD C.J. The garnishee order nisi of February 25 merely held matters with regard to the debt in suspense; the money owed by the garnishee could not then

(1) [1941] 1 All E. R. 274.
(2) (1881) 8 Q. B. D. 319.
(3) [1933] P. 199.
(4) (1880) 49 L. J. (Q. B.) 524.
(5) (1878) 7 Ch. D. 495.
(6) (1884) 14 Q. B. D. 543.
(7) [1894] 2 Q. B. 350.

be dealt with. But that order did not decide who was entitled to the money; that had to be decided on the application to make the garnishee order absolute. It is perfectly true, as counsel has argued, that, if it comes to the knowledge of the district registrar or the master, who is asked to make a garnishee order absolute, that the money in fact belongs to someone other than the garnishee, or that it is suggested that the money belongs to someone else, he ought to make an order under R. S. C. Or. 45, r. 5, ordering that third person to appear and make a claim; in other words, a kind of interpleader proceeding must take place to decide who has the right to the money. *Roberts* v. *Death* (1) was a case in which it was suggested that the money in question was really trust money. Trust money which is in the hands of a garnishee as trustee cannot of course be used to satisfy the judgment creditor's debt, because in equity such money does not belong to the trustee at all; it is the property of the cestui que trust. In the present case the district registrar did not make an order for an inquiry under Or. 45, r. 5, and, for reasons which I will shortly give, I think he was right in not doing so.

The present appeal is alleged to be an appeal by the judgment debtor. In truth it is not an appeal by the judgment debtor at all; it is an appeal by his solicitor who wishes to claim that he is entitled to a charge on the money. The court has had very great doubt whether or not counsel in the present case has any right to be heard in this appeal as representing the judgment debtor, since we do not understand how the judgment debtor is affected by the order. He has the right to a sum of money which he must either pay to his solicitor for his costs or to the judgment creditors. If he pays it to his solicitor he will still owe the money to the judgment creditors, and if he pays it to the judgment creditors he will still owe it to his solicitor. The solicitor is not a party to the present proceedings and, although we have allowed the main question at issue to be argued it seems to be extremely doubtful whether we really had any right to hear the judgment debtor on that question.

The district registrar could only have ordered the solicitor to appear and state the nature of his claim if it was proved, or suggested, to him that the solicitor had a lien or charge on the money. It was said that he had a lien or charge on it because he had a right to apply to the court for a charging order. But he did not in fact so apply. The fallacy which

(1) 8 Q. B. D. 319.

underlies that argument is that it does not take into account the nature of a solicitor's lien on a fund of money which is recovered by his exertions. I will assume that, if the solicitor had in the present case applied to the appropriate court, which would have been either the Court of Passage or the Liverpool county court, or to both, for a charging order, he would have got one. But until he got the charging order he only had at the most an inchoate right to apply for one; he had not a lien on the money. That is clear if the nature of his so-called " lien " is understood. A " lien," in the strict sense of the word, can only exist where the person claiming the lien has the property which he claims to be subject to the lien in his possession. An artificer has a lien on property on which he has spent time, labour and trouble in making repairs or other work because he has that property in his possession and can refuse to give it up until he is paid. In the case of livery stable keepers, on the other hand, the courts have refused to allow claims for a lien, because it has been said that the very nature of the contract was that the horse should be allowed to go out whenever the owner of the horse required it. The stable keeper has no right to a lien in such a case because a lien can only exist on those things on which the person claiming it has his hands, and which he has a right to keep.

A solicitor has a lien on papers of his clients which are in his possession; he can refuse to give up those papers so long as his costs are not paid. He is also commonly said to have a lien on a sum of money which comes into existence owing to his exertions, but in that case the term " lien " is really a misnomer. The solicitor's right in that case is not strictly and accurately a lien because it has not the characteristics of a lien. That was made clear by Cockburn C.J. in *Mercer* v. *Graves* (1), in which he said: " There is no such thing as " a lien except upon something of which you have possession " . . . . although we talk of an attorney having a lien upon " a judgment, it is in fact only a claim or right to ask for the " intervention of the court for his protection, when, having " obtained judgment for his client, he finds there is a probability of the client depriving him of his costs." That passage was cited by Lord Merrivale P. in *Mason* v. *Mason* (2). When that case went to the Court of Appeal, Lord Hanworth M.R., referring to *Mercer* v. *Graves* (1), said (3):

---

(1) (1872) L. R. 7 Q. B. 499, 503.

(2) [1933] P. 199, 205.

(3) Ibid. 214.

"The nature of a solicitor's lien is pointed out in the course "of that case. It is merely a right to claim the equitable "interference of the court, who may order that the judgment "obtained by the solicitor's client do stand as security for "her costs and that payment of such an amount as will cover "them be made to the solicitor in the first instance. That "lien is one which prevails over a fund which is in sight; the "right is one which, so to speak, cannot prevail at large." Those dicta show what the nature of the solicitor's lien is in such a case as the present. It is the solicitor's right to go to the court and to ask the court to charge property in his favour; until that is done he has no right in it. In the present case, when the application for the garnishee order absolute was before the district registrar no charging order had been made or applied for. There was therefore no lien or charge on the money at that time. There was no lien on it in the strict sense of the term, and there was no charge on it because a charging order had not been applied for.

Counsel has referred us to a considerable number of cases. The one nearest in point to the present case is *Shippey* v. *Grey* (1) but, when the facts of that case are understood, it becomes apparent that it is no authority for the present application. The headnote states: "The plaintiffs were the "solicitors for W. in an action in which he recovered a sum "of money. The defendant was a judgment creditor of W. "and obtained ex parte, on the day that judgment was signed "in the above action, a garnishee order attaching all debts "due to W. On the taxation of costs on the same day the "plaintiffs for the first time learned of the defendant's claim, "and then gave notice to the defendant in the action, in which "W. was plaintiff, of their claim of lien, and within five days "applied for an order declaring that they were entitled to "a charge on the money recovered by W. *Held*, affirming "the decision of the Common Pleas Division, that the plaintiffs "had a lien for their costs on the sum recovered by W., that "they were entitled to the order sought for; and that the "garnishee order obtained by the defendant did not take "priority over that lien." But in that case the solicitor had applied for a charging order and it had been, as the Court of Appeal held, wrongfully refused. The Court of Appeal decided therefore that, since the solicitor ought to have been granted a charging order when he applied for it, he was in the same

(1) 49 L. J. (Q. B.) 524.

position for all purposes as if the charging order had been made. His claim could not be defeated because a court had not made the order which it ought to have made. That is the whole explanation, I think, of that case. In the present case it seems to me that, when the application was made to the district registrar for the garnishee order absolute, there was no charge in existence, and that the judgment creditors were therefore entitled to the garnishee order absolute which was made.

Garnishee proceedings are one form of execution and, as I have said more than once in the course of the argument, it not infrequently happens that, where there are several claims, or may be several claims, against money, the person who gets in first gets the fruits of his diligence. If the solicitor in the present case had applied for a charging order when he heard, as he did on February 28, that the garnishee order nisi had been made, he might have got a charging order. If he had got it his charge would have taken precedence over the judgment creditors' claim. But when the application to make the order absolute came before the district registrar, there was no charge in existence. The so-called "lien" had not been perfected because no charging order had been made, and I think therefore that the district registrar was right, and that this appeal must be dismissed.

Birkett J. I agree.

Lynskey J. I also agree. It seems to me that the solicitor in the present case has not taken the right proceedings to protect his own right. The position, as my Lord has pointed out, is that a solicitor's so-called "lien" upon property which is not in his possession is not strictly a lien at all, but a right to go to the court and to ask the court to charge the property for the amount of his costs. In fact, no such application has ever been made in the present case.

The judgment debtor is now apparently claiming that he is adversely affected in some way by the district registrar's order making the garnishee order absolute. Personally, I cannot see that he is adversely affected in any way. It seems to me that he really has no right to be heard in this court.

The proper course for the solicitor to have taken in the present case would have been for him to have applied, after he had heard about the garnishee order nisi on February 28, for a charging order. If he had got his charging order before the garnishee order nisi was made absolute, and if he could have produced the order of the court and brought it to the attention of the registrar, the registrar would have been bound, if the solicitor's claim had been disputed, to direct an inquiry under Or. 45, r. 5.

The result in my view is that the district registrar did the only thing competent to him in the circumstances, having regard to the terms of the Or. 45, r. 5. I agree with my Lord that this appeal must be dismissed.

LORD GODDARD C.J. added that an appeal from a garnishee order absolute lay not to a judge in chambers under R. S. C. Or. 35, r. 9, but to the Divisional Court under Or. 54, r. 22A, and that Birkett J. had been right in dismissing the appeal to him on that ground.

Appeal dismissed.

Solicitors for judgment debtor: *McKenna & Co. for G. H. Mossop, Liverpool.*

R. P. C.

Affirmed. C.A. [1949] 2 All E.R. 1021.

Affirmed [1950] 1 K. B. 284

1949
May 4, 5, 6, 9, 10, 12.

Byrne J.

MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD.

Water—Land drainage—Catchment board—Cleansing watercourse—Dredgings deposited on bank of river—Diversion of floodwater—Damage to bridge of adjoining landowner—Injury through exercise of board's statutory powers—Compensation—Action for damages for nuisance—Not maintainable—Limitation—Public authority—Commencement of action within one year of neglect or default—Continuing act, neglect or default—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21.

In pursuance of their powers under s. 34, sub-s. 1, of the Land Drainage Act, 1930, the defendant catchment board dredged a river in proximity to the plaintiff's mill and deposited the dredgings on the south bank of the river, thereby raising the height of the bank by from one to two feet. The last dredgings were placed on the bank on January 6, 1944, and they there remained until December, 1946. In that month the river flooded and, owing to the increased height of the south bank, the flood waters were unable to escape over it as they had previously done and were compelled to run through a by-pass on the north of the river with the result that they caused the collapse of a bridge belonging to the plaintiff. On November 5, 1947, the plaintiff issued a writ against the defendants claiming damages for nuisance. The defendants contended (1.) that no action for nuisance was maintainable at law and that the plaintiff's only remedy for an injury caused by the exercise of the board's statutory powers was by a claim for compensation under s. 34, sub-s. 3, of the Land Drainage Act, 1930, and (2.) that even if an action for nuisance would lie, it would be barred by s. 21 of the Limitation Act, 1939.

Held, (1.) that " injury " in s. 34, sub-s. 3, of the Land Drainage Act, 1930, connoted a legal right of action which would exist in the absence of the board's statutory powers and that where there was such an injury there was a right to compensation which was the injured party's only remedy; (2.) where there was a dispute as to a right to compensation it was the duty of the arbitrator to decide (*a*) whether there was such an injury as would, but for the statute have given a right of action, and (*b*) the appropriate amount of compensation; (3.) under ss. 34 and 38 of the Act the board was empowered to raise the height of the river bank by depositing dredgings thereon, and if, as the result of their doing so, damage was done to the plaintiff which would have been actionable at common law apart from the statute, he would be entitled to compensation; (4.) that the board by their act had diverted the ordinary flood course of the river and had thus committed an act which, if done by a riparian proprietor, would have rendered him liable to an action at the suit of a person damaged thereby. The plaintiff had therefore, been injured within the meaning of s. 34, sub-s. 3, and would be entitled to compensation, but an action for nuisance was not maintainable by him; (5.) Even assuming that such an action would lie, the plaintiff's claim would be barred by s. 21 of the Limitation Act, 1939, since the board being a public authority, an action against them in respect of a neglect or default by them must be begun within one year of the date on which the cause of action accrued or, in the case of a continuing act, neglect or default, within one year of its ceasing. The alleged wrongful act of depositing dredgings on the south bank of the river was completed on January 6, 1944, and as there was no duty on the board to remove the dredgings, there was no continuing act, neglect or default by the board in allowing them to remain. The writ not having been issued until November 5, 1947, any action by the plaintiff in respect of the depositing of the dredgings would be barred.

ACTION.

The facts as found by Byrne J. were shortly as follows. The plaintiff, B. F. Marriage, was a miller and the owner of Limbourne Mill, situated on the River Waveney, at Wortwell, near Harleston, Norfolk. He also owned a bridge across a

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

by-pass channel on the north side of the river, which led to the mill. The River Waveney was included in the district of the East Norfolk Rivers Catchment Board, the defendants, in the action, and from October 1, 1943, the board, in the exercise of the powers conferred on them by ss. 34 and 38 of the Land Drainage Act, 1930 (1), were engaged in dredging the river. They deposited the dredgings on the south bank of the river and, by so doing, raised the bank from one to two feet. The actual work of dredging was completed on January 6, 1944.

---

(1) Land Drainage Act, 1930, s. 34, sub-s. 1: "Every drainage "board acting within its district "shall have power—(*a*) to main"tain existing works, that is to say, "to cleanse, repair or otherwise "maintain in a due state of effi"ciency any existing watercourse "or drainage work: (*b*) to improve "any existing works, that is to "say, to deepen, widen, straighten "or otherwise improve any exist"ing watercourse, or remove mill "dams, weirs or other obstructions "to watercourses, or raise, widen, "or otherwise improve any exist"ing drainage work; (*c*) to con"struct new works, that is to say, "to make any new watercourse or "drainage work or erect any "machinery or do any other act "not hereinbefore referred to, "required for the drainage of the "area comprised within their "district."

Sub-s. 3: "Where injury is "sustained by any person by "reason of the exercise by a drain"age board of any of its powers "under this section, the board "shall be liable to make full com"pensation to the injured person, "and in case of dispute the "amount of the compensation "shall be determined in the man"ner in which disputed compensa"tion for land is required to be "determined by the Lands Clauses "Acts."

Section 38, sub-s. 1: "A drain"age board, without making pay"ment therefor or giving "compensation in respect thereof, "may appropriate and dispose of "any shingle, sand, clay, gravel, "stone, rock or any other matter "removed in the course of the "execution of any work for widen"ing, deepening or dredging any "watercourse, and may deposit "any matter so removed on the "banks of the watercourse or use "it in any other manner for the "maintenance or improvement of "those banks or for the purposes "of the execution of any other "work which the drainage board "have power to execute."

Limitation Act, 1939, s. 21, sub-s. 1: "No action shall be "brought against any person for "any act done in pursuance, or "execution, or intended execution "of any Act of Parliament, or of "any public duty or authority, or "in respect of any neglect or "default in the execution of any "such act, duty or authority, "unless it is commenced before "the expiration of one year from "the date on which the cause of "action accrued: Provided that "where the act, neglect or default "is a continuing one, no cause of "action in respect thereof shall be "deemed to have accrued, for the "purposes of this subsection, "until the act, neglect or default "has ceased."

In December, 1946, the river was in flood and, by reason of the heightening of the south bank, the flood waters were unable to escape over it as they had in previous years and were compelled to run through the by-pass channel, with the result that the buttresses supporting the plaintiff's bridge were undermined and the bridge collapsed. On November 5, 1947, the plaintiff issued a writ against the defendants by which he claimed damages for nuisance and an injunction. By their defence, the defendants pleaded that no action by the plaintiff was maintainable, and that even if it were, it was barred by s. 21 of the Limitation Act, 1939.

Fortune for the plaintiff. An action for nuisance is maintainable in the present case. Section 34, sub-s. 3, of the Land Drainage Act, 1930, which is relied on by the defendants as showing that where an injury has been sustained by a person as the result of something done by the catchment board his only remedy is to claim compensation, does not apply to the present case. It only applies when the injury of which complaint is made has resulted from the exercise by the board of its statutory powers, and has no application when the board has caused damage by negligent and unnecessary acts, amounting to a nuisance, which could and should have been avoided and which are not within the powers conferred by the Act: *City of Manchester* v. *Farnworth Corporation* (1). The jurisdiction of the court is only ousted by sub-s. 3 of s. 34 in favour of arbitration as provided for under the Lands Clauses Acts, when the acts of the board of which the injured party complains, are acts within the statutory powers of the board and if the issue arises whether the acts fall within that category, the matter is one for the court to determine. All that is referred to arbitration in s. 34, sub-s. 3, is the determination of what is the full amount to be paid in a case in which a dispute arises as to the sum to which the injured party is entitled by way of compensation for an injury sustained by him as the result of the exercise by the board of its statutory powers under s. 34. If, as submitted, an action for nuisance by the plaintiff is maintainable, it would not, in the present instance, be affected by the provisions of s. 21 of the Limitation Act, 1939. That section provides that in the case of a public authority, an action in respect of any neglect or default by the authority must be commenced within one year from the

(1) [1929] 1 K. B. 533.

1949

Marriage v. East Norfolk Rivers Catchment Board.

date on which the cause of action accrued, or in the case of a continuing act, neglect or default, within one year from the date on which it ceased. Here, although the actual depositing of the dredgings on the south bank of the river was completed on January 6, 1944, the leaving of the dredgings on the bank was a continuing act, neglect or default within the meaning of s. 21 which had not ceased at the time when the damage occurred in December, 1946, and as the writ was issued within one year of that date, s. 21 has no application: *Boynton* v. *Ancholme Drainage and Navigation Commissioners* (1). [He also referred to *Trafford* v. *Rex* (2) and *Huyton and Roby Gas Governors* v. *Liverpool Corporation* (3).]

Kenneth Diplock K.C., R. A. McDonald and *A. G. de Montmorency* for the defendants. The plaintiff's action fails in limine because, even if the heightening of the south bank of the river would have been actionable by the plaintiff if done by a riparian owner, it was an act which falls within the express powers of the catchment board under the Land Drainage Act, 1930. The dredging of the river was a work of " maintenance " under s. 34, sub-s. 1 (*a*), the raising of the bank by the deposit of dredgings thereon was a work of " improvement " under sub-s. 1 (*b*), while s. 38 gives express power to the board to dredge a river and deposit dredged material on the banks, or use it in any other manner for drainage works. The provisions of that section do not exclude the plaintiff from the general right to compensation given by s. 34, sub-s. 3, and he would be entitled to compensation as a person " by whom injury is sustained by reason of the " exercise by a drainage board of any of its powers under " this section." The plaintiff's only remedy, however, would be for compensation under s. 34, sub-s. 3, of the Act. In the case of a dispute, which includes a dispute as to the right to compensation, as well as to its amount, both questions are to be determined by arbitration " in the manner in which " disputed compensation for land is required to be determined " by the Lands Clauses Acts." " Injury " in s. 34, sub-s. 3, means something done by the board which would have been actionable but for the powers conferred on them by statute: *Hall* v. *The Mayor, Aldermen and Burgesses of the Borough of Bristol* (4); *Rhodes* v. *Airedale Drainage Commissioners* (5).

(1) [1921] 2 K. B. 213.
(2) (1832) 8 Bing. 204.
(3) [1926] 1 K. B. 146.
(4) (1867) L. R. 2 C. P. 322.
(5) (1876) 1 C. P. D 380.

If a riparian proprietor raises the bank of a river to prevent the flooding of adjacent land this would not be actionable even although its effect is to throw the flood waters on to some other person's land (*Gerrard* v. *Crowe* (1)) nor is it actionable if done by a drainage board (*Rex* v. *Commissioners for Sewers for Pagham* (2)). To create liability in such a case there must be an interference with a regular flood channel, which formed a part of the bed of the river: *Menzies* v. *Breadalbane* (3). In the present case there was no question of a regular channel since, in time of flood, the water merely overflowed a stretch of the banks of the river. [They also referred to *Farnworth* v. *Manchester Corporation* (4) and *Trafford* v. *Rex* (5).]

Even if an action lay at the suit of the plaintiff it would be barred by the Limitation Act, 1939. The catchment board is a public authority and by s. 21, the period of limitation in the case of a public authority is one year from the date on which the cause of action accrued. The plaintiff's cause of action, if any, arose in December, 1944, by which time all the dredgings had been deposited on the bank. Any failure by the board to remove the deposit after that date was a mere non-feasance for which it would not be liable: *Smith* v. *Cawdle Fen Commissioners* (6) approved in *East Suffolk Rivers Catchment Board* v. *Kent* (7). There was, therefore, no continuing cause of action within the meaning of the proviso to s. 21 of the Limitation Act, 1939, to prevent the limitation period of one year from running.

Cur. adv. vult.

May 12. BYRNE J. stated the facts and continued: I now turn to the law. On behalf of the catchment board, it is contended that this action is misconceived; that no such action lies against the board, and that the plaintiff's only remedy is to seek compensation under s. 34, sub-s. 3, of the Land Drainage Act, 1930. This action is based on nuisance, and it is necessary to look at s. 34 of the Land Drainage Act. By s. 34, sub-s. 1, the board has power to maintain and improve existing works, and to construct new works. It is provided that the power the board has is " (*a*) to maintain existing

---

(1) [1921] 1 A. C. 395.
(2) (1828) 8 B. & C. 355.
(3) (1828) 3 Bli. N. S. 414.
(4) [1929] 1 K. B. 533.
(5) 8 Bing. 204.
(6) [1938] 4 All E. R. 61, 164.
(7) [1941] A. C. 74.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Byrne J.

"works, that is to say, to cleanse, repair or otherwise maintain "in a due state of efficiency any existing watercourse or "drainage work: (*b*) to improve any existing works, that is "to say, to deepen, widen, straighten or otherwise improve "any existing watercourse, or remove mill dams, weirs or "other obstructions to watercourses, or raise, widen, or "otherwise improve any existing drainage work: (*c*) to "construct new works, that is to say, to make any new "watercourse or drainage work or erect any machinery or "do any other act not hereinbefore referred to, required for "the drainage of the area comprised within their district." It is, therefore, plainly given power to violate private rights, and indeed, without that power, the statute would be rendered nugatory.

It is provided by sub-s. 3 of the same section that "Where "injury is sustained by any person by reason of the exercise "by a drainage board of any of its powers under this section, "the board shall be liable to make full compensation to the "injured person, and in case of dispute the amount of the "compensation shall be determined in the manner in which "disputed compensation for land is required to be determined "by the Lands Clauses Acts."

I take the word "injury" in that sub-section to connote a legal right of action but for the powers which the catchment board have under this statute, and in my view the sub-section means that if that which is complained of would have been actionable at common law but for the statute, there is a right to compensation.

The sub-section provides that "in case of dispute the amount "of the compensation shall be determined in the manner "in which disputed compensation for land is required to be "determined by the Lands Clauses Acts." It has been argued on behalf of the plaintiff that that sub-section is concerned only with the quantum of compensation; but in reply to that argument two cases have been cited—*Rhodes* v. *Airedale Drainage Commissioners* (1) and *Hall* v. *The Mayor, Aldermen and Burgesses of the Borough of Bristol* (2). Those cases appear to me to establish the proposition that in a case in which there is a dispute with regard to compensation, an arbitrator is to determine, firstly, whether there was injury which would have given a right of action but for the statute; and secondly, if there was, the appropriate amount of compensation.

(1) 1 C. P. D. 380.

(2) L. R. 2 C. P. 322.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Byrne J.

Section 38, sub-s. 1, of the Land Drainage Act, 1930, provides that "A drainage board, without making payment "therefor or giving compensation in respect thereof, may "appropriate and dispose of any shingle, sand, clay, gravel, "stone, rock or other matter removed in the course of the "execution of any work for widening, deepening or dredging "any watercourse, and may deposit any matter so removed "on the banks of the watercourse or use it in any other manner "for the maintenance or improvement of those banks or for "the purposes of the execution of any other work which the "drainage board have power to execute." Then there is a proviso, which does not really affect this case.

The effect of those two sections, ss. 34 and 38, in my view, is as follows: Firstly, that the board had power to do that which is complained of in this case, that is to say, to raise the height of the south bank of the river by placing thereon the dredgings from the river; and secondly, that, assuming the effect of what the board did was to cause damage to the plaintiff, which would have been actionable at common law but for the statutory authority conferred on the board, the plaintiff's only remedy is the remedy under s. 34, sub-s. 3, of claiming compensation fixed by arbitration under the Lands Clauses Act. A riparian owner is entitled to erect or heighten banks upon his land, although the effect of doing so is to divert flood water from his land to the land of another person, and the person to whose land the flood water is diverted, has no cause of action at common law. The authority for that proposition is to be found in *Gerrard* v. *Crowe* (1) and *Rex* v. *Commissioners of Sewers for Pagham, Sussex* (2).

By s. 34 of the Land Drainage Act a catchment board is entitled to do the same thing without any liability for damage caused. On the other hand, if what was done can be regarded as an interference with a regular flood channel which formed part of the bed of the river, then, in the case of a riparian owner, such action would render him liable at common law. The authority for that proposition is to be found in *Menzies* v. *Breadalbane* (3), and *Bickett* v. *Morris* (4).

Upon the facts, I have come to the conclusion that the catchment board, by its act, diverted the ordinary flood course of the river, and thus did an act which, had it been done by a riparian owner, would have rendered that riparian owner liable to an action; but having regard to the terms of the statute, I am of opinion that no action based on nuisance will lie against the board, and that the plaintiff's only remedy is under s. 34, sub-s. 3.

---

(1) [1921] 1 A. C. 395.

(2) 8 B. & C. 355.

(3) 3 Bli. N. S. 414.

(4) (1866) L. R. 1 Sc. & D. 47.

Assuming, however, that I am wrong about that, and that an action based on nuisance will lie against the catchment board, the remaining question is whether this action is barred by the Limitation Act of 1939. Section 21 of that Act provides that the action must be commenced within one year of the cause of action, and then there is a proviso "that where "the act, neglect or default is a continuing one, no cause "of action in respect thereof shall be deemed to have "accrued, . . . until the act, neglect or default has ceased."

The wrongful act alleged here was the depositing of dredgings on the south bank of the river. That work was completed on January 6, 1944, and thus that was the day upon which the cause of action arose. The authority for that proposition is to be found in *Nicholls* v. *Ely Beet Sugar Factory Ld.* (1), and in *Harrop* v. *Hirst* (2). No positive act is alleged after January 6, 1944, and the writ was not issued until November 5, 1947.

The catchment board were not the owners of the land on which the dredgings were placed by them under their statutory powers; hence the only thing that can be said against the board after January 6, 1944, is that they did not exercise the power which they had under s. 34 to remove the dredgings. There was no duty on them to do so, and thus it follows that, in my view, this action is barred by the Limitation Act. Thus, although the conduct of this catchment board leaves, in my opinion, much to be desired, for the reasons I have given this action fails, and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *Bute and Bowyer, for Daynes, Keefe & Durrant, Norwich.*

Solicitors for the defendants: *Church, Adams, Tatham & Co., for Sprake and Chadwick, Norwich.*

---

(1) [1936] Ch. 343.

(2) (1868) L. R. 4 Ex. 43.

P. B. D.

LAZARUS-BARLOW *v.* REGENT ESTATES CO. LD. AND ANOTHER.

C. A.

1949

May 10, 11, 30.

Lord Greene M.R., Evershed and Somervell L.JJ.

Landlord and tenant—Rent restriction—Flat let before September, 1939—*Landlord covenants to provide hot water and other services—Decision in* 1944 *that value of services took letting outside Acts—Decision of* 1944 *not operating in rem—Flat re-let at increased rent on similar terms—Tenant not bound by* 1944 *decision—Res inter alios acta—Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 11, *sub-s.* 1.

On September 1, 1939, a flat, which was of a rateable value to have been brought within the provisions of the Rent Restriction Acts by the Act of 1939, was occupied by K. under a lease at an annual rent of 165*l.*, the landlords covenanting to perform certain services. In 1944, after K.'s lease had expired, the landlords brought proceedings for ejectment against K. in the High Court which were heard by Lord Caldecote C.J. who held that the value of the services rendered by the landlords to K. under his lease formed a substantial portion of the rent and accordingly K. was not entitled to the protection of the Acts. By a lease of May 11, 1945, the landlords let the premises to L.B. on similar terms to the letting to K. but at the increased rent of 280*l.* In these proceedings L.B. applied under s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, to have the standard rent of the flat determined. The county court judge held that the effect of the decision of Lord Caldecote C.J. was that the previous letting was not one to which the Rent Restriction Acts applied. It followed, since there had been no letting before September 1, 1939, that the standard rent was the rent at which the premises were first let since that date, namely 280*l.* L.B. appealed on the ground that the decision of Lord Caldecote C.J. was not binding on her and that that decision was wrong as being inconsistent with the decision of the House of Lords in *Palser* v. *Grinling* [1948] A. C. 291.

Held, allowing the appeal, that the decision of Lord Caldecote C.J. did not operate in rem so as to be conclusive against all persons who might thereafter be interested in the premises as to the effect of the letting to K. Accordingly, it was open to the appellant to apply under s. 11, sub-s. 1, of the Act of 1923 to have the rent of the premises determined. The case must be remitted to the county court to determine the standard rent upon the footing that the judgment of Lord Caldecote C.J. was res inter alios acta. That judgment could not be reconciled with the decision of the House of Lords in *Palser* v. *Grinling* [1948] A. C. 291, and the county court judge must apply to the facts of this case the principles laid down in that decision disregarding the observations of Lord Caldecote C.J. in the earlier case.

Lloyd v. *Cook* [1929] 1 K. B. 103. *King* v. *York* [1919] W. N. 59. *Griffiths* v. *Davies* [1943] K. B. 618, considered.

The appellant, Miss Phyllis Marjorie Lazarus-Barlow, in these proceedings applied under s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, to have the standard rent of a flat, No. 28 Manor House, Marylebone, determined.

The flat, which was of a rateable value to be brought into control by the Act of 1939, was on September 1, 1939, in the occupation of one Kerner under a lease granted by the first defendants, the Regent Estates Co. Ld., for a term of three years at the annual rent of 165*l.* That lease contained covenants by the landlords to supply hot water and to perform other services. In 1944 the Regent Estates Co. Ld. brought proceedings for ejectment against Kerner (*Regent Estates Co. Ld.* v. *Kerner* (1)) which were heard by Lord Caldecote C.J. who made an order for possession, holding that Kerner was not entitled to the protection of the Acts as the services rendered by the landlords under the lease formed a substantial portion of the rent. Lord Caldecote C.J.'s judgment is fully stated in the judgment of Evershed L.J.

By a lease dated May 11, 1945, the Regent Estates Co. Ld. let the flat to the appellant. This lease contained similar covenants and conditions as the lease to Kerner except that the rent was 280*l.* Subsequently Regent Estates Co. Ld. sold the premises to Myrton Estates Ld., the second defendants.

The appellant in these proceedings contended that the standard rent of the premises was 165*l.*, the rent payable by Kerner, and not 280*l.* and she claimed repayment of rent overpaid. Myrton Estates Ld. counterclaimed for arrears of rent.

The county court judge held that, having regard to the decision of Lord Caldecote C.J., the Kerner letting was a letting outside the Rent Restriction Acts altogether and must be disregarded and accordingly the first letting since September 1, 1939, which was in fact the letting to the appellant, was the letting which fixed the standard rent which was therefore 280*l.*

Beney K.C. and *G. H. Crispin* and *Alfred Stone* for the appellant, the plaintiff. The county court judge ought not to have held that the premises were not controlled in 1939 for the evidence all went to show that they were. The judge felt bound, however, by the previous decision between the first defendant in this action and a previous tenant: *Regent*

---

(1) (1944) Estates Gazette, 575.

Estates & Co. v. *Kerner* (1). Such a decision is not a decision binding on other parties in regard to the same property but a decision inter partes which the judge was free to disregard, if, on the facts, he would wish to come to a different conclusion and hold the premises to be controlled. On a true view, the standard rent is 165*l.* but the matter will require to be considered on the evidence by the county court judge and for this purpose the case should be referred back to him.

[SOMERVELL L.J. The previous decision having been arrived at between lessor and lessee, do you say that this decision can be challenged in so far as third parties are concerned ?]

Yes. The court cannot be prevented by estoppel from determining matters laid down by statute—in this case the Rent Restriction Acts—see *J. & F. Stone Lighting & Radio Ld.* v. *Levitt* (2), where *Griffiths* v. *Davies* (3) was approved. Here the county court judge should have given effect to the evidence showing that the premises had become controlled on September 1, 1939, and not felt bound by the earlier decision in *Kerner's* case (1). A decision as between the first defendant and another tenant cannot be decisive as between the plaintiff and the first and second defendants. They referred to *Palser* v. *Grinling* (4) where *Kerner's* case (1) is referred to.

[LORD GREENE M.R. If the value of services in *Kerner's* case (1) on September 1, 1939, has to be considered, some difficulty might arise.]

It is argued that if the value of the services is a substantial part of the rent now, it has to be shown that the letting on September 1, 1939, also fell within s. 10 of the Rent Restrictions Act of 1923.

[SOMERVELL L.J. You are arguing that there is no res judicata but the court might well feel obliged to accept the decision in *Kerner's* case (1).]

It is submitted that the right test was not applied in that case. It might be said that there was a difficulty in filling up a hole in the evidence, but that is immaterial to the question whether the county court judge had before him an open question. In *Griffiths* v. *Davies* (3) it was laid down that a statutory provision could not be overridden by a previous decision inter partes and that decision was approved by the House of Lords in *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* (2). One other authority is *Signy* v. *Abbey National*

---

(1) (1944) Estates Gazette 575.

(2) [1947] A. C. 209.

(3) [1943] K. B. 618.

(4) [1948] A. C. 291.

C. A.
1949
LAZARUS-BARLOW
v.
REGENT ESTATES CO. LD.

Building Society (1). If the county court judge could rightly find that the letting was with services sufficient to take it out of the Rent Restriction Acts, there would be nothing to exclude his so finding; but it must be a finding of fact by him and the case must go back to the judge for him to determine that question without regard to the previous decision in *Kerner's* case (2).

Marshall K.C. and *I. H. Jacob* for the Myrton Estates Ld., the second defendants. The argument that *Kerner's* case (2) was not a judgment in rem was not addressed to the county court judge. The argument now advanced on that ground is entirely wrong. *Kerner's* case decided that the premises were not controlled on September 1, 1939, for all time. That is an estoppel by record preventing the plaintiff from successfully arguing that the premises became controlled on that date. An estoppel by record is that referred to in Halsbury's Laws of England (2nd ed.), vol. 13, p. 399. That is the ground on which the county court judge's decision can be supported. A judgment in rem is a judgment deciding the status of something. *Kerner's* case decided the status of this flat vis-à-vis the law of the letting. Here the court is considering the same letting for the same period of time. It has already been held that premises under that particular letting were outside the Rent Restriction Acts, having regard to s. 12, sub-s. 2, of the Act of 1920. It is conceded that there may be a different quality of status where the decision was made inter partes, but there is more than one kind of status and all that is suggested here is that the status under the particular letting was determined.

[LORD GREENE M.R. That is a difficult conception.]

It is submitted that it has been decided again and again that when a decision has to be arrived at as to the operation of the Rent Restriction Acts in regard to a tenancy it is a matter of status: *King* v. *York* (3) and *Lloyd* v. *Cook* (4). Having regard to the decision in *Kerner's* case this flat remains decontrolled. Control depends upon property being within the Acts in the first instance. The Rent Restriction Acts operate in rem: *Prout* v. *Hunter* (5); *Property Holding Co. Ld.* v. *Clarke* (6). The general character of a judgment in rem was settled long prior to the passing of the Rent Restriction

(1) [1944] K. B. 449.
(2) (1944) Estates Gazette 575.
(3) [1919] W. N. 59.
(4) [1929] 1 K. B. 103, 128.
(5) [1924] 2 K. B. 736.
(6) [1948] 1 K. B. 630.

C. A.

1949

LAZARUS-BARLOW
v.
REGENT ESTATES
CO. LD.

Acts. Those Acts are unique. They interfere with ordinary contractual rights and fix something analogous to status. In particular certain legal rights are anchored to the property at a particular period when the rights of the tenant are determined. Thus the standard rent, which a tenant has to pay, is determined by the rent paid by another. In such circumstances where the status of an earlier letting has been bona fide litigated and determined, subsequent tenants seeking to have the standard rent fixed must accept the earlier decision as establishing the facts there proved. If this matter can be relitigated, the landlord can be vexed not once but several times for the same cause. Here there are two defendants. It must be assumed that the price paid by the second defendants when purchasing was fixed on the basis of the earlier judgment. If the judgment of Lord Caldecote C.J. is not binding, a county court judge would be in a position to reverse a decision of the High Court.

I. H. Jacob in the same interests. If an earlier judgment as to the status of the premises can be challenged by a subsequent tenant, it will be open to a landlord to challenge such a decision against a subsequent tenant. It is submitted that the question of what is the standard rent cannot be relitigated.

Lloyd Jones K.C. and *G. W. Willett* for the first defendants, Regent Estates Co. Ld.

Beney K.C. in reply. There is no authority in which it has been held that a decision determining status under the Rent Restriction Acts is a decision in rem: all the cases in which there is a reference to status have been cases where the facts were not in dispute. It is necessary to show something in the Acts themselves which makes a decision under them operate in rem. There is nothing in the Acts to suggest that a decision is to bind persons not parties to it. The respondent's argument is based on the ground of inconvenience.

Cur. adv. vult.

May 30. The following judgments were read:

LORD GREENE M.R. I have read the judgment about to be read by Evershed L.J. I agree with it and only propose to add a word or two of my own.

In the course of the argument I was impressed by the suggestion that the legislature might have been expected to provide for the finality of judgments of the county court determining whether a given dwelling-house was one to which the Rent Restriction Acts applied or what its standard rent should be. It would no doubt have been convenient (though the practical inconvenience must not be exaggerated) if a judgment in such a matter, given as between competent parties, could have been made binding on the whole world. At one time I was attracted by the argument that the use in certain authorities of such expressions as that the Acts "operate in "rem" required or justified such an interpretation. On consideration I have come to the conclusion that these observations, when their history is examined, cannot be interpreted to mean that judgments under the Acts operate in rem, a quite different conception. If the legislature had intended so radical a departure from the ordinary rule that a judgment inter partes, which does not fall under one of the known heads of judgment in rem, is, so far as third persons not privies are concerned, res inter alios acta, it would have said so. In the present case, moreover, the language of s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, seems to make it clear that any tenant can apply to the county court for a determination of the amount of the standard rent, a provision which, in my view, is quite inconsistent with the idea that an applicant would be conclusively bound by a previous decision to which he was no party. There are other difficulties which are referred to by my brother Evershed. The order will be as my brother will state.

EVERSHED L.J. The judgment I am about to read is the judgment of Somervell L.J. and myself.

These are proceedings by the appellant, Miss Lazarus-Barlow, under s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, to have determined the standard rent of a flat, No. 28, Manor House, Marylebone, of which she is the tenant. Her present landlords are the second respondent company, who acquired from the first respondent company on June 30, 1948, the reversion expectant on the appellant's lease.

The lease is dated May 11, 1945. It was for a term of seven years from March 25, 1945, and the contractual rent was 280*l.* per annum. By its terms the first respondent company (in effect) covenanted to provide certain services (by way of delivery of coals, removal of refuse, etc.). It is unnecessary to refer further to the terms of the lease, for it has been conceded for the purposes of this appeal that the value to the appellant (at the date of the granting of the lease) of these services was (as fixed by the county court judge) not more than 26*l.* per annum, a figure rather less than 10 per cent. of the amount of the rent. Since the rateable value of the flat is and was at all material times within the limit set by the Rent Acts, the flat is and was prima facie within the ambit of those Acts ; and it is also conceded that the proportion which the value of the services previously mentioned bears to the total rent of 280*l.* is not such as to exclude the premises from the Acts.

On September 1, 1939, the flat was in the occupation of one Kerner as tenant of the first respondent company. Kerner's lease was for practical purposes identical with the appellant's lease, save that the term was three years, and that the rent fixed thereby was 165*l.* per annum instead of 280*l.* per annum, and it is the appellant's case in these proceedings that that rent (165*l.* per annum) constitutes the standard rent of the premises.

In the year 1944 the first respondent company brought proceedings (*Regent Estates Co. Ld.* v. *Kerner* (1)) in the High Court for ejectment against Kerner, and on December 5, of that year they obtained from Viscount Caldecote C.J., an order for possession. We have been supplied with a transcript of the reasons given by the learned Chief Justice for his judgment ; and from this document it is quite plain that Kerner sought to rely, by way of defence to the claim made against him, upon the Rent Acts ; and that the first respondent company's answer to that defence was that the value of the services rendered by the first respondent company under the lease to Kerner (which were, as we have stated, the same as those which the second respondent company are now liable to render to the appellant) formed a substantial portion of Kerner's rent (that is, 165*l.* per annum). (See s. 3, sub-s. 2 (*b*), of the Rent and Mortgage Interest Restrictions Act, 1939, and s. 10, sub-s. 1, of the Act of 1923, as amended by sch. 1 to the Act of 1939.) This question was decided by the learned Lord Chief Justice in favour of the first respondent company, the material part of his judgment being in the following terms : " There are fifty-two flats and to

---

(1) (1944) Estates Gazette 575.

" perform those services, which is admitted to be attendance " within the meaning of the Act, it seems to me that a " substantial cost was involved. Perhaps I ought not to use " the words 'substantial cost' because on this I had not " intended to express a view, but if everybody was to have " coal brought up and the dust and refuse removed before " 9 a.m., I think there must have been a considerable payment " expended in employing persons who would carry out those " duties. I have to consider whether that considerable " expenditure is a substantial part of the rent. I can only " interpret 'substantial part of the rent' as meaning a real " part of the rent and not a mere trifle. 'Substantial' cannot " mean half or a quarter or a third of anything of that sort ; " it means something which can be recognized and ascertained " and quantified. I have been given a figure in evidence " as to the cost of the services which were rendered, some " of which were clearly, as Mr. Green admitted to me, not " to be taken into account as attendance provided in " consideration of rent, but although I do not think that " anything like 2,000*l*. should be regarded as paid for providing " attendance, I am satisfied that these services must have " required the employment of men who would be paid 2*l*., " 3*l*. or 4*l*. a week, and a proportion of those payments would, " of course, be expended in respect of each of those fifty-two " flats."

If this decision was correct, it follows that the lease to Kerner was not a letting to which the Rent Acts applied, with the result that the flat was not " let " on September 1, 1939, within the meaning of the Rent Acts (for it must be taken that by the word " let " is meant " let pursuant to a " letting to which the Acts apply ": see *Signy* v. *Abbey National Building Society* (1)). It follows accordingly, since there was no " letting " before September 1, 1939, that the standard rent of the premises has to be determined by reference to the " letting " since that date, namely, the letting to the appellant ; in other words, the standard rent on this view will be 280*l*. per annum, and this is the answer of the respondents to the appellant's claim.

The appellant, however, by way of premise to her case, says that Lord Caldecote C.J.'s decision, having been made in proceedings to which she was not a party, is not binding on her. She claims further that the decision was wrong,

(1) [1944] K. B. 449.

being inconsistent with the recent decision of the House of Lords in *Palser* v. *Grinling* (1), and that she is entitled in the present proceedings to litigate afresh in the county court the question whether the lease to Kerner was or was not within the ambit of the Rent Acts, and to have that question determined in her favour on the ground that in the light of the House of Lords' decision in *Palser* v. *Grinling* (1) the value to Kerner of the services to which he was entitled was not a substantial portion of the rent of 165*l.* As later appears the last point is one which, if the premise of the appellant's argument is well founded, would have to be remitted to the county court for determination. But, if the appellant is justified in all her contentions, it follows that the standard rent of the premises is 165*l.* per annum instead of 280*l.* per annum; and it follows, consequently, that she would be entitled to have the order against her on the second respondent company's counterclaim for 110*l.* 13*s.* 4*d.* set aside and to obtain judgment, in respect of overpaid rent, against the first and second respondent companies respectively for 70*l.* 6*s.* 0*d.* and 94*l.* 14*s.* 0*d.*

As we have already indicated, the real question which is presented for the determination of this court is that involved in the premise to the appellant's argument, namely, whether it is now open to the appellant to raise in these proceedings the character of Kerner's lease or whether (as the respondent companies say) that matter has been irrevocably determined by the judgment of Lord Caldecote C.J., a judgment which was admittedly given by a court of competent jurisdiction in an action bona fide litigated between the then landlord and the then tenant, and which was not appealed from, and is not now capable of being appealed from by the tenant, or capable of being appealed from by the present appellant, who was not a party to the proceedings.

The point is a short one but by no means easy; and though many cases have been cited to us in argument no authority has been found which bears directly upon it. In his short judgment the county court judge expressed the view that the appellant was not precluded from arguing that her own tenancy was a protected tenancy by reason merely of the Kerner judgment, that is, that it was open to her to argue that the value of the services rendered to her under the lease of 1945 was not a substantial portion of her rent notwithstanding the decision of Lord Caldecote C.J. that the value of the identical services rendered to Kerner constituted a substantial portion of his rent of 165*l*. a year. Upon this point we think the county court judge was clearly right. He proceeded, however, as follows: "It is common ground "between the parties that on the assumption that the" (appellant's) "tenancy is a protected tenancy . . . . the "standard rent is the rent at which the property was first "let after September 1, 1939," (if) "of course, it was not let "on that date. It was let on September 1" (1939) "but "the letting . . . . was the Kerner letting, and there is "ample authority for the proposition that in arriving at the "standard rent I must disregard any rent which was in respect "of a letting outside the Act. The learned Chief Justice "held that the Kerner letting was outside the Act. Therefore, "the Kerner rent was one which I am bound to disregard." It is round the last sentence: "Therefore, the Kerner rent "was one which I am bound to disregard" that the whole argument has ranged, for no criticism has been made, or can be made, of the preceding language.

---

(1) [1948] A. C. 291.

It is clear that the Kerner judgment cannot operate to estop the appellant per rem judicatam: but learned counsel for the respondent companies have contended that having regard to the policy and general tenor of the Rent Acts the judgment had the effect of determining at its date the "status" of the flat as outside the scope of the Acts, and (at any rate to that extent) had the quality of a judgment "in rem" binding accordingly on all the world, or at least upon the appellant.

The Rent Restriction legislation has since it was first introduced given rise to a rich volume of judicial decisions, and judges have from time to time observed it to be a characteristic of the legislation that it operates "in rem and "not in personam." Counsel not unnaturally referred to a number of instances. But they then proceeded to argue that from these authorities it followed, or should follow, that judgments determining the "status" of specific premises (that is, that they were or were not at a particular date a dwelling-house within the Acts) should be treated as judgments "in rem" so as to be binding on all the world or upon all persons subsequently interested in the premises, and not only on parties to the decision or their privies.

In our judgment this argument cannot be accepted. It is not, we think, necessary for the purposes of the present case to attempt to define what is the precise significance of the phrase that has been used, " the Acts operate in rem," save to observe that it appears to be used in a somewhat special sense. The term " judgment in rem " is one clearly understood by the law and has been defined as meaning " a judgment of a " court of competent jurisdiction determining the status of a " person or thing, or the disposition of a thing (as distinct " from the particular interest in it of a party to the litigation)"; see Halsbury's Laws of England, Hailsham Edition, vol. 13, p. 405; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matters actually decided. (See Phipson on Evidence, 8th ed., p. 401.)

The words " the Acts apply in rem " have been used, by way perhaps of analogy, to illustrate the point that, given certain facts, the Acts will or may operate not merely in relation to a particular tenancy of some premises and between the parties to that tenancy, but in relation to the premises as such; for example, by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part (per Greer L.J. in *Lloyd* v. *Cook* (1): see also the earlier case of *King* v. *York* (2), where a Divisional Court held that it was the house itself and not a particular tenant that was protected); and, though we have examined carefully all the cases cited to us in argument, it is clear that in none of them was the point raised, still less decided, that a determination of the facts essential to and involving the applicability of the Acts to any premises pronounced by a court of competent jurisdiction operated as conclusive evidence for or against persons not parties or privies to the judgment.

The question in the present case is not whether the Acts operate in rem, but whether determinations by the courts of matters of fact or of mixed law and fact essential to the application, or non-application, of the Acts to particular premises on particular dates operate " in rem," in the sense of binding not only parties to the proceedings and their privies, but all other persons who may thereafter be interested in the premises.

It is clear that if judgments of the kind stated have so extensive an effect, the result involves a substantial departure

(1) [1929] 1 K. B. 103, 135. (2) [1919] W. N. 59.

from the ordinary rule. Mr. Beney on behalf of the appellant was at least entitled to say that in the absence of direct authority the burden was on his opponents to point to the provisions of the Acts which expressly or by necessary implication lead to so far-reaching a result.

As already stated we have not seen the order in fact made by Lord Caldecote C.J. We assume it to have been an order in common form against Kerner commanding him within a limited time to deliver up possession of the premises in suit to the first respondent company. Such an order would not on the face of it appear to have any of the qualities of a judgment "in rem." It is, however, said that when regard is had to the reasons given by the Chief Justice for his judgment it is clear that the order made necessarily involved a determination of the question that at its date the letting to Kerner was not a controlled letting. That is true. The respondents' argument, however, involves, in the first place, as it seems to us, the application to judgments in suits relating to premises which at some date (past or future) fall within the embrace of the Rent Acts considerations properly relevant to estoppel by record, that is, that such judgments will have the binding effect claimed as regards any matters (relevant to the application of the Acts) which were in fact raised and determined in the action and also presumably which could and should have been so raised.

There is also, in our judgment, considerable difficulty in the way of accurate formulation of the extent and limits of the principle sought to be established. It was conceded by Mr. Marshall that the judgment relied upon would have to be free of any taint or fraud or collusion, and to have been pronounced in an action "duly litigated." Where, as in the present case, the qualities of a particular tenancy have been judicially determined in an action between the actual parties to the contract, there is obvious force in the argument that such a decision ought at least to carry more weight than a determination of the same question between persons who were not parties to the bargain, and the more so where one of the matters in issue is the value to the tenant at the date of the contract of board, attendance or the use of furniture.

But if the principle for which the respondent companies contend be admitted, where and how is the line to be drawn? If there had been no Kerner judgment in the present case, would a determination of the character of the Kerner letting and (consequently) of the standard rent made in the present proceedings between the appellant and the respondent companies bind future tenants not deriving title from the appellant ? What of a judgment capable of being shown to be based on some manifest error of fact—for example, an erroneous entry in the rate books of a rateable value ? Would a judicial determination that certain premises were not within the Acts made in proceedings between a vendor and purchaser bind future tenants ? Would a judicial determination between a landlord and occupier that the latter was not a tenant but a licensee bind a rating authority ? If an affirmative answer is given to the above questions, it is obvious that the principle sought to be established is of a very far-reaching character. And the difficulties are formidable of finding in the Acts any language to justify either so extensive a departure from the general rule, or, on the other hand, a principle requiring so elaborate a formulation.

In our judgment it is impossible to find any sufficient justification in the Acts for either of these last mentioned alternatives. As we have already indicated, the proposition that the Acts apply in rem does not involve the further proposition that judgments establishing the conditions for the application, or non-application, of the Acts likewise operate in rem. Nor do we think that any sufficient support can be derived from considering the general " policy " of the Acts. So far indeed as policy is concerned, the effect in the present case seems rather to be the other way. " The whole scheme " of the Act," said du Parcq L.J. in *Griffiths* v. *Davies* (1), " is to prevent a tenant from coming to any agreement or " doing anything else which will have the effect of increasing " the standard rent." In that case what the tenant had done was to fail in earlier proceedings to take certain points which would have had the effect of reducing the amount recoverable from him by way of arrears of rent, and it was held by this court that it would be contrary to the policy of the Acts and the duty imposed thereby upon the courts to treat such failure as operating to estop the same tenant from subsequently applying under s. 11, sub-s. 1, of the Act of 1923 to have the standard rent truly determined. In the present case, if the argument of the respondent companies prevails, the Kerner judgment, though wrongly decided (if it was wrongly decided) will for all time prevent any tenant from having the standard rent properly determined.

---

(1) [1943] K. B. 618, 622.

Moreover, the terms of s. 11, sub-s. 1, itself (under which the present application has been made) seem to us against the contention of the respondent companies. The sub-section, so far as relevant, is as follows: "The county court shall "have power on the application of a landlord or a tenant "to determine summarily any question as to the amount "of the . . . . standard rent of any dwelling-house to which "the principal Act applies." The terms of the sub-section are perfectly general, and would, in our view, be inapposite if a determination of the standard rent . . . . of a dwelling-house once made between a particular landlord and a particular tenant were intended to be conclusive for all time.

Reference may also be made to s. 6 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides that in proceedings for fixing the standard rent of any premises to which the Act applies, if no evidence is available in regard to the rent of those premises at the material date, the court may for the purposes of those proceedings determine their standard rent by reference to the standard rent of similar premises. The section concludes ". . . . as from the date "on which any determination is made under this section "the standard rent of the dwelling-house shall, unless the "court making the determination otherwise orders, be deemed "for all purposes to be of that amount." The question is not before us whether the words in the section "for all purposes" are intended (in contradistinction to the earlier words in the section "for the purpose of those proceedings") to have the effect that a determination under the section binds persons not parties or privies to the proceedings in which the determination is made; or whether they mean no more than that the figure arrived at shall, as between the persons bound by the decision according to the ordinary rule of law, be treated as the standard rent for all purposes of the Acts, for example, for the purpose of determining the amount of any permitted increase in the rent or the amount of rent that is legally recoverable.

Without, therefore, expressing any opinion on the proper construction of this section it is, in our judgment, sufficient to say that if a determination under the section binds persons other than parties to the original proceedings or their privies it must do so by virtue of the language at the end of the section to which we have referred, that no such words occur in s. 11, sub-s. 1, of the Act of 1923, and that in any case

s. 6 of the Act of 1933 appears to contemplate a right in a party affected to apply to the court for a review of the earlier decision.

It is also we think pertinent to bear in mind the circumstances in which determinations may have to be made by county courts, not infrequently upon applications where one or both parties may be legally unrepresented and, therefore, at a considerable disadvantage in presenting to the judge the relevant law or facts.

A forceful argument was put to the court based on the inconvenience and hardship which would result if the appellant were to succeed. And it is true that the advantages of certainty and finality are considerable in cases arising under the Acts where as often as not one or both of the parties concerned are persons of slender means. Moreover, in the present case the first respondent company fixed the present contractual rent of 280*l.* per annum on the faith of the Kerner decision, and no doubt the purchase price paid by the second respondent company for the whole block of flats was in some degree influenced by that rent. But, in our judgment, the argument of inconvenience and hardship cannot overcome the difficulties which we have indicated. Nor, after all, is the inconvenience likely to be so very great in practice. A new tenant under a new tenancy would in the normal case be at a great disadvantage if he sought in effect to upset a previous determination duly litigated between the parties to an earlier contract. All the relevant facts would be in the possession of the landlord. It is true that a landlord might seek to harass subsequent tenants in an attempt to improve upon an earlier decision given against him. But he would be liable to somewhat severe cross-examination upon the material of the earlier decision, and in any case he could not presumably harass any one tenant more than once.

The present case may work a hardship upon the respondent companies if the appellant ultimately succeeds. But the hardship is after all no greater than that suffered by any landlord who fixes a rent upon a bona fide but mistaken belief as to his rights. And under our system of law a decision by this court or the House of Lords overruling some earlier case at first instance may upset many a calculation based upon the latter's authority.

In the result, therefore, and for the reasons we have stated, we think this appeal should be allowed, and that the case should be remitted to the county court to determine the standard rent upon the footing that the Kerner judgment must in the present proceedings be regarded as res inter alios acta.

We were invited by Mr. Crispin, in the event that the appellant is entitled to succeed on the main question, to go farther and determine here and now the standard rent. Mr. Crispin argued that the court was in possession of all relevant facts, and that in the light of the judgments of the House of Lords in *Palser* v. *Grinling* (1) and having regard to the notorious rise in the cost of providing the material services between 1939 and 1944, we ought to hold that the Kerner letting was not excluded from the operation of the Acts and to fix the standard rent accordingly at 165*l.* per annum.

We do not think we ought to accede to this argument. The whole matter being on the view we take res integra between the parties it is open to either side to raise any question of law or fact which they or she may think proper. And the question is by the terms of s. 11, sub-s. 1, of the Act of 1923 one specifically deputed to the county court.

We think, however, it is right that we should make some observations upon Lord Caldecote C.J.'s judgment in the Kerner case. The case was referred to both in this court and in the House of Lords in *Palser* v. *Grinling* (1). In this court Morton L.J. said in reference to that judgment (2): "The decision in that case may have been justified, having "regard to the very wide admission made as to the services "which constituted 'attendance'; but Lord Caldecote "is reported as saying: 'As to the meaning of "a substantial "' "part of the rent," this could only be interpreted as "'meaning a real part and not a mere trifle. It could not "'mean one-half or one-quarter or one-third or anything "'of that sort; it meant something which could be recognized "'and ascertained and quantified.' If these observations "are correctly reported, I am unable to agree with them."

The House of Lords did not approve the figures by way of percentage which Morton L.J. had suggested as a guide. But the decision of this court was affirmed. No express reference is to be found in any of the speeches to the *Kerner* judgment, but Viscount Simon said this (3): "It is plain "that the phrase"—that is, "substantial portion"—

---

(1) [1948] A. C. 291.

(2) [1946] K. B. 631, 641.

(3) [1948] A. C. 291, 316, 317.

C. A.
1949

LAZARUS-BARLOW
v.
REGENT ESTATES
CO. LD.

Evershed L.J.

"requires a comparison with the whole rent, and the whole "rent means the entire contractual rent payable by the "tenant in return for the occupation of the premises together "with all the other covenants of the landlord. 'Substantial' "in this connexion is not the same as 'not unsubstantial,' "that is, just enough to avoid the 'de minimis' principle. "One of the primary meanings of the word is equivalent to "considerable, solid, or big. It is in this sense that we speak "of a substantial fortune, a substantial meal, a substantial "man, a substantial argument or ground of defence. Applying "the word in this sense, it must be left to the discretion of "the judge of fact to decide as best he can according to the "circumstances in each case, the onus being on the landlord. "If the judgment of the Court of Appeal in *Palser's* case "were to be understood as fixing percentages as a legal "measure, that would be going beyond the powers of the "judiciary."

We agree with the language of Morton L.J. in the passage cited above. In our view the judgment of Lord Caldecote C.J. cannot be reconciled with the opinion of Lord Simon or with the opinions of the other noble Lords in *Palser* v. *Grinling* (1). The county court judge must, therefore, in the present case apply to the facts as he finds them the principles laid down by the House of Lords in *Palser* v. *Grinling* (1), and he should in the circumstances disregard the observations of Lord Caldecote C.J. in the Kerner case.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Stone and Stone; Martineau and Reid; Cooper, Bake & Co.*

(1) [1948] A. C. 291.

B. A. B.

Affirmed. H.L. [1950] 1 All E.R. 1018. *Referred to.* SOLLE *v.* BUTCHER [1950] 1 K. B. 674 *Affirmed.* [1950] A. C. 508 *Followed.* FRANCIS JACKSON DEVELOPMENTS LD. *v.* HALL [1951] 2 K. B. 488

SEAFORD COURT ESTATES LD. *v.* ASHER.

C. A.
1949
May 2, 3;
June 1.

Lord Greene M.R., Asquith, and Denning L.JJ.

Landlord and Tenant—Standard rent—Letting at higher rent—Burden imposed on landlords in lease—Burden not mentioned in previous tenancy agreement—Burden then voluntarily undertaken by landlords—Transfer of burden to landlords—Some increase of rent thereby justified—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.

By a tenancy agreement dated September 23, 1935, a flat was let at a yearly rent of 175*l.* for the term of three years. The rent of 175*l*. became the standard rent under the Rent and Mortgage Interest (Restrictions) Act, 1939. The agreement contained no undertaking by the landlords except to pay rates. By a lease dated September 27, 1943, the plaintiffs let the flat for the term of five years and some days to the tenant at the old rent during the continuation of the war and afterwards at the yearly rent of 250*l*. In this lease the landlords covenanted to do certain things including the removal of refuse from the flat and the supply of hot water for the use of the flat. During the earlier tenancy the landlords had voluntarily done these things. The question raised on this appeal was whether under s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, there had been a transfer of a burden to the landlords justifying an increase in the rent over the standard rent.

Held, (1.) that on the construction of the words " the terms on " which any dwelling-house is held are on the whole not less " favourable " " terms " meant contractual terms.

(2.) that a burden had been transferred to the landlords under the lease of 1943 affording a ground for an increase of the rent over the standard rent. This was so, although the tenant under the earlier lease was under a merely contingent burden arising if landlords ceased to perform voluntarily the services contractually undertaken by them under the lease of 1943.

Winchester Courts, Ld. v. *Miller* [1944] K. B. 734 applied.

Property Holding Co. v. *Clark* [1948] 1 K. B. 630 not followed in so far as the court must there be taken to have decided that under the second part of s. 2, sub-s. 3, a tenant must de facto have borne a burden afterwards contractually transferred to the landlord.

Case referred back to the county court judge to determine whether, and, if so, to what extent the burden transferred was over-valued by the increase of rent on the standard rent.

APPEAL from Bloomsbury county court.

By a tenancy agreement dated September 23, 1935, a flat on the first floor of Seaford Court, Great Portland Street, W., was let to one Edwards for the term of three years from September 29, 1935, at the yearly rent of 175*l*. payable in advance quarterly. The only undertaking by the landlords was to pay all rates and taxes, except charges for electric light and gas. The tenant remained in occupation after the termination of the tenancy agreement until 1939. The rent of 175*l*. became the standard rent, the rateable value being less than 100*l*. The flat remained empty till 1943. By a lease dated September 27, 1943, the plaintiffs, Seaford Court Estates Ld., let the flat to the defendant, Richard A. J. Asher, from September 1, 1943, for the term of five years and twenty-eight days at the yearly rent of 250*l*. reducible to 175*l*. per annum until three months after the cessation of hostilities in the existing war, the rent to be paid quarterly in advance. The lease contained covenants by the plaintiffs (1.) to keep the main walls and timbers, roof, drains and pipes and the exterior of the premises and the staircase, hall, lifts, passages and such other internal parts as should be used by the plaintiffs in good and substantial repair and properly lighted and to keep all cisterns and water pipes in the flat in good and substantial order ; (2.) to arrange for the removal of domestic refuse of the flat in bins every day except Sunday ; and (3.) to provide and maintain a proper supply of hot water for the use of the flat.

The defendant having failed to pay the quarter's rent due in advance on June 24, 1948, the plaintiffs commenced proceedings for the rent of 62*l.* 10*s.* 0*d.* on December 14, 1948. The defendant counterclaimed for rent in excess of the standard rent paid since March 25, 1946, amounting to 168*l.* 15*s.* 0*d.* or alternatively 150*l.* by deduction from the rent claimed and all subsequent rent becoming payable or alternatively to recover the amount of the overpayments.

The question that arose at the hearing was whether the increase of rent over the standard rent was justified under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (hereinafter called the " Rent Restrictions Act, 1920 "), s. 2, sub-s. 3 (1) by reason of the burden cast on the plaintiffs for the first time by the covenants in the lease of 1943 seeing that no such burden was imposed on the plaintiffs under the earlier tenancy agreement, although they had then voluntarily undertaken that burden.

The county court judge held that no burden was in fact transferred by the lease of 1943. He therefore gave judgment

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3, provides : " Any transfer to a tenant of any " burden or liability previously " borne by the landlord shall, for " the purposes of this Act, be " treated as an alteration of rent, " and where, as a result of such " a transfer, the terms on which a " dwelling-house is held are on the " whole less favourable to the " tenant than the previous terms, " the rent shall be deemed to be " increased, whether or not the " sum periodically payable by way " of rent is increased and any " increase of rent in respect of " any transfer to a landlord of any " burden or liability previously " borne by the tenant when, as the " result of such transfer, the " terms on which any dwelling- " house is held are on the whole not " less favourable to the tenant than " the previous terms, shall be " deemed not to be an increase of " rent for the purpose of this Act."

in favour of the defendant for 112*l*. 10*s*. 0*d*. being the excess payment of rent paid during the preceding two years, less 43*l*. 15*s*. 0*d*. being the proper amount of rent that became due in June, 1948.

The plaintiffs appealed and the defendant cross-appealed.

Henderson K.C. and *James Macmillan* for the plaintiffs. This appeal turns on the construction of s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The standard rent of these premises is based on the terms of the tenancy agreement of 1935. Under that agreement the only burden on the landlord was to pay rates and taxes. It contained no provision for the supply of hot water or for the removal of refuse. Under the tenancy agreement of 1943 the landlord undertook to pay additional assessments, to do repairs, to remove domestic refuse and to maintain a supply of hot water. It is submitted first: that in s. 2, sub-s. 3, the landlord and tenant referred to are not individuals already in contractual relationship. The reference is to the relationship generally: per Luxmoore L.J. in *Winchester Court Ld.* v. *Miller* (1). Secondly, the sub-section has to be construed liberally so as to give effect to any variation of the terms of the contract by which the standard rent is ascertained no matter how the variation is brought about; per Scott and Evershed L.JJ. *Property Holding Co. Ld.* v. *Clark* (2). Thirdly, the word "transfer" in the sub-section is synonymous with "change" or "shifting." Fourthly, the sub-section is not restricted to consensual transfers. Fifthly, "burden or liability" is not tautologous. "Burden" is equivalent to a de facto responsibility. They referred to *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* (3). The object of the sub-section is to maintain the equilibrium between the landlord and the tenant.

Stephenson for the defendant. There is nothing in *Winchester Court Ld.* v. *Miller* (1) which concludes this case. In that case a contractual burden was transferred to the landlord. Here no contractual burden has been transferred to the landlord. The fact that the landlord has now undertaken to do what he in fact did in 1935 does not mean that any burden or liability previously borne by the tenant has been transferred to him. Both limbs of the sub-section pre-suppose that it is a contractual burden which has been transferred. Further it is submitted that for the sub-section to apply the landlord must know what the original position was and fix the new rent in the light of that position. If the landlord increases the rent more than is authorized by s. 2, sub-s. 3, the whole increase is irrecoverable. The landlord must both show that the increase was in respect of a transfer of a burden which was previously borne by the tenant and that the increase was reasonable. This he has not done here. In spite of the decision in *Property Holding Co. Ld.* v. *Clark* (1) the county court judge was right in finding that no burden previously borne by the tenant had been transferred to the landlord. Burden in the sub-section refers to matters which the tenant was bound to do. If there was no burden on the tenant under the original agreement none can have been transferred to the landlord. Lastly, there is no evidence that the landlord put up the rent because he undertook these obligations.

---

(1) [1944] K. B. 734, 748.

(2) [1948] 1 K. B. 630.

(3) [1948] 2 K. B. 351.

Evershed L.J. in *Property Holding Co.* v. *Clark* (1) pointed out that there were certain burdens which naturally fell on the lessor or the lessee—as, for example, the common staircase and hall to a number of flats over which the landlord alone had control. So too there are certain burdens which might automatically be transferred to the tenant of a flat because he could not otherwise use the flat.

[DENNING L.J. Must you not look at the facts before and after the lease of 1943 was granted ?]

Yes, and there was no transfer of burden under the new lease because it only imposed on the landlords a burden they had previously undertaken voluntarily. Moreover part of this burden was necessarily undertaken by the landlords. It would be the true converse of *Clark's* case (1) if Edwards had been under covenant in 1935 to do what the landlords would be expected to do and in 1943 the landlords expressly undertook this burden. Then there would be a shifting of the burden. It is difficult to see why the court should not apply that principal. Here the landlords in fact had previously undertaken the burden which was in 1943 expressly cast on them by the new lease. There was then no shifting in the burden to justify an increase in the rent. When regard was had to the terms of the two lettings on the facts, it is clear that the tenant under the first letting never undertook the burden now expressly undertaken by the landlords. *Clark's* case (1) shows that the shifting must be of at least a practical burden in order to make s. 2, sub-s. 3, applicable. Is not the language of the sub-section perfectly clear as to this ? There has been no transfer of a burden and therefore there was no right for the landlords to increase the rent. The increase of rent must be " in respect of " a transfer to the landlords of a burden " previously borne by the tenant." The words are strong and show that any burden not previously borne cannot be transferred. The fact that the tenant, Edwards, never bore the burden in question shows conclusively that the sub-section has no application.

---

(1) [1948] 1 K. B. 630.

Henderson K.C. replied.

Cur. adv. vult.

June 1. Their Lordships read their judgments.

LORD GREENE M.R. The relevant facts are stated in the judgments of Asquith L.J. and Denning L.J., which I have had the advantage of reading. I agree with their conclusions and the reasoning on which they are based, and have only a few words of my own to add. I may say, however, that the true interpretation of s. 2, sub-s. 3, of the Rent Restrictions Act, 1920, is a matter which appears to me to be left by the authorities in some obscurity and might well be the subject of consideration by the highest tribunal. The present question arises under the second limb of the sub-section, which deals with the case where there has been an increase of rent. In order to ascertain whether what is de facto an increase of rent ought, for the purposes of the Act, to be deemed not to be an increase of rent, we are required to compare the " terms " on which the dwelling-house was held previously to the de facto increase of rent with the " terms " on which it is held subsequently to that increase. The meaning of the word " terms " in this context is not, in my opinion, open to doubt. It bears the ordinary meaning of that word when found in a lease, that is, the provisions of the lease which are binding in law. For the purpose of this comparison we are required to ascertain whether (1.) the de facto increase of rent is in respect of a transfer to the landlord of a burden or liability previously borne by the tenant, and (2.) whether the result of such transfer is to make the new terms not less

(1) [1948] 1 K. B. 630.

favourable than the previous terms. This must, as it seems to me, involve a weighing of " terms " in the new lease, one of which (the increase of rent) is detrimental, and the other of which (the assumption of a transferred burden or liability by the landlords) is beneficial to the tenant ; and for the purpose of that operation I should have thought that it was not permissible to go outside the " terms " and consider the effect of something which cannot properly be described as a term ; in other words, the transfer of the burden or liability must be something which of itself operates to make a change in the " terms " of the lease capable of being weighed against the other relevant " term," i.e., the increase in the rent.

In the present case there came into existence in the new lease a " term " which was absent from the previous lease, namely, the contractual liability of the landlord to provide the services in question, and for the reasons given by Asquith L.J., the increase of rent, or at any rate an appropriate amount of it, must, I think, be taken as having been made " in respect " of that assumption of liability. In the circumstances can it be said that there has been a " transfer " to the landlord of a " burden or liability previously borne " by the tenant " ? There was admittedly no transfer of a " liability," since that word, in my opinion, means a legal liability enforceable by the landlord, or by a third party, for example, a local authority. The word " burden " is, however, in my judgment, apt to describe the position of the tenant. That word must, I should have thought, at any rate include a thing which the tenant as such reasonably desires to have provided for his benefit for the provision of which he has no legal right of recourse against anyone else, his landlord or a third party. In the present case the services in question were reasonably desired by the tenant, and he had no such right of recourse. If he wanted them the burden, so far as his legal position was concerned, lay on his own shoulders, and the assumption of liability by the landlord relieved him of that burden. It is suggested that we should take into account the circumstance that during the currency of the old lease the landlord was voluntarily providing the services. But there was no " term " in the old lease that he should do so, and for the purposes of the required comparison of " terms " I do not myself see how it is possible to introduce something which operated in fact but cannot in any way be regarded as a " term." I do not myself think that this

C. A.

1949

SEAFORD COURT ESTATES LD. *v.* ASHER.

conclusion is inconsistent with any decision by which we are bound. If, however, I am wrong in this, I am prepared to accept the views expressed by Asquith L.J. in relation to that topic. The order will be as mentioned by him.

ASQUITH L.J. This is an appeal by the plaintiff company and a cross-appeal by the defendant from a decision of His Honour Judge Dale in the Bloomsbury county court, whereby he adjudged that the plaintiff company was entitled to succeed against the defendant to the extent of 43*l.* 15*s.* 0*d.* on a claim for one quarter's rent of a flat in Great Portland Street, and that the defendant's counterclaim in respect of rent overpaid in the past was entitled to succeed to the extent of 112*l.* 10*s.* 0*d.* He accordingly gave judgment for the defendant for a balance of 68*l.* odd.

The flat in question was let by the plaintiff company to the defendant by a lease of September 22, 1943, at a rent of 250*l.* per annum payable quarterly in advance. The plaintiff company claimed 62*l.* 10*s.* 0*d.* being one quarter's rent at that annual rate payable on June 24, 1948, for the quarter beginning on that day. The defendant, who had been paying for a considerable time on that basis, set up that the landlord company was not entitled to claim more than the standard rent, which he alleged (and it is now agreed) was 175*l.* per annum. At that annual rate the proper quarterly rent would be 43*l.* 15*s.* 0*d.*, 18*l.* 15*s.* 0*d.* less than 62*l.* 10*s.* 0*d.*, the quarterly rent claimed on 250*l.* per annum. The defendant accordingly contended (1.) that the plaintiff company's claim for the quarter's rent should be reduced from 62*l.* 10*s.* 0*d.* to 43*l.* 15*s.* 0*d.*; (2.) that he was entitled to counterclaim for each of eleven quarters previous to June 24, 1948, an over-payment of 18*l.* 15*s.* 0*d.*, making 206*l.* 5*s.* 0*d.* in all. The learned judge found the standard rent of the flat was 175*l.* per annum, awarded the plaintiffs 43*l.* 15*s.* 0*d.* for one quarter's rent on this basis, and sustained the counterclaim for repayment of 18*l.* 10*s.* 0*d.* quarterly, not for eleven quarters as claimed, but for six quarters only, on which footing, as stated, it totalled 112*l.* 10*s.* 0*d.*, and 68*l.* odd was due on balance to the defendant.

Against this result the plaintiff company appealed and the defendant cross-appealed. The ground of the plaintiffs' appeal was that they were entitled to charge rent at 250*l.* per annum—75*l.* more than the standard rent—by reason

C. A.

1949

SEAFORD COURT ESTATES LD. v. ASHER.

Asquith L.J.

of the provisions of s. 2, sub-s. 3, of the Rent Restrictions Act, 1920, so far as that sub-section relates to transfers of burdens or liabilities from a tenant to a landlord. The grounds of the cross-appeal by the defendant were that the county court judge should have held that the 18*l.* 15*s.* 0*d.* repayment per quarter was due not in respect of six quarters only, but of a longer period. His notice of cross-appeal argues for this repayment in respect of nine quarters, but as to one of these quarters the claim has been waived by the defendant, and the difference between six and eight quarters was conceded by the plaintiffs in the course of the argument in this court.

The relevant facts are not in dispute. The flat in question was the property of the plaintiff company at least as long ago as 1935. By a lease of September 23 of that year they let it to one Edwards at 175*l.* per annum, and it is conceded (the flat having a rateable value of 62*l.*) that it is subject as to rent to the Rent Restriction Acts, and that this figure of 175*l.* represented the standard rent. That lease contained no covenants to be performed by the landlords save a single one to pay rates and taxes. Edwards' term expired on September 29, 1938, but he held over till December, 1939. The flat was vacant from then till September, 1943. It was then let to the defendant at a rent of 250*l.* This second lease contained a number of covenants to be performed by the landlords. Inter alia they covenanted to pay certain impositions other than rates and taxes, to repair the exterior of the house, to remove refuse, and (most important of all) to provide hot water, an onerous obligation at a time when the cost of fuel was rising and supplies precarious. The county court judge, however, found that, while the plaintiffs under their earlier lease to Edwards, had not yet assumed a legal obligation to provide any of these services, de facto and as an act of grace they did during that period provide all of them. This finding is important since the county court judge inferred from it that there had been no "transfer of a "burden or liability" to the landlords within s. 2, sub-s. 3, of the Rent Restrictions Act, 1920, and gave judgment in favour of the defendant on the basis of this inference.

Section 2, sub-s. 3, of the Act of 1920, so far as material, reads as follows: "Any transfer to a tenant of any burden "or liability previously borne by the landlord shall, for the "purposes of this Act, be treated as an alteration of rent, "and where, as the result of such a transfer, the terms on which

C. A.

1949

SEAFORD COURT ESTATES LD. v. ASHER.

Asquith L.J.

"a dwelling-house is held are on the whole less favourable "to the tenant than the previous terms, the rent shall be "deemed to be increased, whether or not the sum periodically "payable by way of rent is increased"—now follows the material limb of the sub-section—"and any increase of rent in respect "of any transfer to a landlord of any burden or liability "previously borne by the tenant where, as the result of such "transfer, the terms on which any dwelling-house is held are "on the whole not less favourable to the tenant than the "previous terms, shall be deemed not to be an increase of rent "for the purposes of this Act." While the construction of this provision is obscure and difficult its broad aim is plain: First: A tenant who pays an unreduced money rent (namely, the standard rent plus permitted increases, if any) must not get less for it. If he does, the rent is to be treated as increased. This is the object of the first limb of the sub-section. Secondly, the object of the second limb is that a landlord who charges an "increased" rent (more than the standard rent plus permitted increases, if any) may not exact the increase unless, and save to the extent that, he gives more for it. Any increase of rent not justified on this basis need not be paid by the tenant, and, if paid, can be recovered back by him. The second limb of the sub-section is the relevant one in this case. The plaintiffs as landlords had to show that the increase of the rent from 175*l.* (the standard rent) to 250*l.* was an increase to which that limb applied, and which in consequence of its application was to be "deemed not to be an" (unpermitted) "increase for the purposes of the Act"; in other words, that it was to be deemed to be legally exigible by the landlords, and if paid by the tenant irrecoverable by him.

Now in order to bring the increase of rent within the relevant part of the sub-section so that it can be "deemed" not to be an unpermitted increase, the landlords must establish four propositions: (i) that "the terms on which the dwelling-house "is held," though changed, "are not less favourable to the "tenant" than they were before the increase of rent; (ii) that the change in the terms is the "result" of "a transfer to the "landlord of a burden or liability"; (iii) that this "burden "or liability" was before the transfer "borne by the tenant"; (iv) that the increase in the rent is an increase "in respect "of the transfer" in question. I am of opinion, with my Lord, that in the first of these propositions "terms" means "contractual terms," namely, legal rights or obligations, not mere de facto advantages or handicaps. When a statute is speaking of the terms on which premises are held by a tenant from a landlord there is a strong presumption that it means the first. Before inquiring, on this assumption, whether the above four propositions are established in relation to the facts of the present case, and the provision therefore applies, it may be helpful to proceed by stages and to consider first whether the provision has any, and if so what, application on somewhat simpler facts.

(*a*) It clearly does apply (and this is the simplest case) where a legal obligation is transplanted from the back of the tenant to the back of the landlord, provided the increase of rent does no more than compensate the landlord for this transplantation. For, in that case, there is a transfer to the landlord of a "liability" previously borne by the tenant, this transfer "results" in new contractual "terms" which (after the increased rent has been allowed for) are "not less "favourable to the tenant," and the increased rent is "in "respect of that transfer" (a statement which I will try to make good later).

(*b*) At the other end of the scale the provision clearly does not apply where no obligation enters into the picture, where, for example, the landlord voluntarily begins to provide some service for the tenant with which the tenant had until then voluntarily provided himself or gone unprovided, because the provision clearly contemplates only cases in which the (contractual) "terms" are affected, and on the facts assumed they will not have been affected: *First National Housing Trust* v. *Chesterfield R. D. C.* (1).

(*c*) Between these extremes fall cases (of which the present is one example) where the landlord assumes a legal obligation previously not resting on the tenant, or the tenant is relieved of a legal obligation, previously resting on him, which is not shifted as an obligation on to the shoulders of the landlord. (For example, the present case, and *Winchester Court Ld.* v. *Miller* (2).)

In such cases there has clearly been a change in the (contractual) "terms" on which the dwelling-house is held. But does that change "result" from "a transfer to the land-"lord of a burden or liability previously borne by the "tenant"? In approaching this question some significance

---

(1) [1948] 2 K. B. 351.

(2) [1944] K. B. 734.

C. A.
1949

Seaford Court Estates Ld. v. Asher.

Asquith L.J.

must be attributed to the phrase "burden or liability." If "liability" (which suggests a legal obligation stricto sensu) had stood alone the natural inference would be that there must, to satisfy the provision, never be less than what has been called the transplantation of an obligation as in case (*a*) above. The addition of the words "burden or" implies that something less or something looser than such a transplantation will suffice, and two cases decided directly under s. 2, sub-s. 3, both bear out this view. One appears to say that the "something less" is enough; the other that the something less is essential and (possibly) that something more is necessary. These two cases are *Winchester Court Ld.* v. *Miller* (1) and *Property Holding Co. Ld.* v. *Clark* (2). In neither of them did the landlord, as in the present case, assume an obligation; in each case a party was released from one. In *Miller's* case (1) the tenant, who had previously been saddled with a full repairing covenant, was later released from that part of the obligation which covered "fair wear and tear." In *Clark's* case (2) the landlord, who had previously been under an obligation (*a*) to provide certain cooking and heating facilities, and (*b*) to do certain other things (for example, clean the common stair), was later released from these obligations. *Clark's* case (2) therefore, was one within the first limb of s. 2, sub-s. 3, which treats of "transfer of a burden" from the landlord to the tenant; but is none the less relevant for that, when the question is what is meant by "transfer "of a burden," for presumably this phrase bears the same meaning in the second limb as in the first. In neither case did the obligation which one party had shaken off alight as an obligation on the shoulders of the other. The landlord in *Miller's* case (1) did not become bound in law to make good "fair wear and tear." The tenant in *Clark's* case (2) did not become bound in law to provide the cooking and heating facilities involved, or to do the other things referred to. Nevertheless the court held in *Miller's* case (1) without reserve or qualification that there had been "a transfer to the landlord "of a burden previously borne by the tenant." *Miller's* case (1) decides that there is a sufficient "transfer" where the tenant divests himself of a legal obligation to provide a service previously incumbent on him without the assumption of a corresponding legal obligation by the landlord. It is enough if what passes to the landlord is the practical necessity,

(1) [1944] K. B. 734.

(2) [1948] 1 K. B. 630.

or indeed short of that the mere expediency, of providing the service himself. This appears plainly from the argument when read in conjunction with the judgment of Scott L.J. Counsel for the tenant arguing that there had been no "transfer," says (1): "The liability to repair contained in "Platini's covenant was not replaced in whole or in part by "an undertaking of the landlords." Mr. Comyns Carr (for the landlords) submitted on the same page (in his reply): "There is a transfer of burden from tenant to landlord if a "tenant ceases to be liable for repairs, since, if the landlord "does not do the repairs, the property will lose value"; and Scott L.J. opens his judgment (with which MacKinnon L.J. agreed) as follows: "The words of s. 2, sub-s. 3, of the Act "of 1920 are sufficient to cover Mr. Comyns Carr's "'interpretation'." *Miller's* case (1), therefore, decides that to constitute a "transfer" of a burden it is sufficient if one party sheds an obligation to provide a service, and the other party thenceforward has, as a matter not of contractual duty but of practical need or even of mere prudence, to provide it for himself. For short we will speak of such a transfer as a transfer of the "practical burden." In *Miller's* case (1) the Court of Appeal seems to have thought it wholly immaterial whether in the sequel the transferee of the practical burden discharged that burden by actually providing the service in question for himself or not. The "burden" would still have been transferred to the landlord if he had elected not to make good wear and tear, preferring to see his house deteriorate.

On this simple rule *Clark's* case (2) embroiders certain qualifications. That part of *Clark's* case (2) which is here relevant is contained in the judgment of Evershed L.J. (as he then was) with which both of the other members of the court expressed agreement, though Scott L.J.'s judgment contains some remarks not easy to reconcile with his professed conformity. But Evershed L.J.'s judgment is at the lowest a majority judgment. The learned Lord Justice (dealing with cases where there has been something less than the transplantation of an obligation) says in effect that the shifting of the "practical burden" is not merely something which may satisfy the words "transfer of a burden" but that (*a*) nothing less will avail to satisfy them; (*b*) something more is, or may be, needed to do so; and he adds (*c*) that a transfer will not extend to services, the burden of which, though lifted from the landlord, the tenant is incapable in law of assuming. (*b*) and (*c*) require elaboration. What is (*b*) the porro unum necessarium ? In trying to answer this question, I will for simplicity state the answer in terms of the facts of *Clark's* case (1), a case in which (unlike the present) the landlords did not assume, but were relieved of, an obligation. The court appeared to decide that in such a case not merely must the "practical burden" of supplying the relevant services shift to the tenant, but that he must in fact supply them. There is only a transfer of a burden to the extent (to quote the learned Lord Justice (1)) that "the various articles "covenanted by the landlords in the relevant clause of the "lease of 1934 to be provided . . . . or other articles for "corresponding purposes must now be and are provided by "the tenant"; and the order made in pursuance of this decision of the Court of Appeal actually incorporates the words just quoted. As to (*c*), certain of the obligations of which in *Clark's* case (1) the landlords were relieved were obligations to provide services, such as that of lighting and cleaning the common stair and hall, the burden of which was incapable of transfer to the tenant; because as regards the common stair or hall he had (as against the landlords and the tenants of other flats) nothing more than a right of passage; he could not light or clean without exceeding his rights. It seems possible that when Evershed L.J. (and, therefore, the majority of the court) said "must now be *and are*" (I italicize the last two words) he had in mind only these "non-transferable "services" which "are not" provided by the tenant because he is legally incapable of providing them. If that is all the court meant, the limitation embodied in the words "and are" does not apply to the present case in which "untransferable "services" play no part. It must, however, be acknowledged that in their literal grammatical sense the words "and are" are apt to include more than "untransferable services"; and it is necessary to consider the position on the assumption that they do.

---

(1) [1944] K. B. 734, 739. (2) [1948] 1 K. B. 630.

Parenthetically (before dealing with this possibility) I must consider whether and how far the decision in *Clark's* case (1) (which fell within the first limb of s. 2, sub-s. 3) applies to this case (which falls within the second). If in *Clark's* case (1) the facts had fallen, as in the present case they do, within the second limb of the sub-section, the court which

(1) [1948] 1 K. B. 630, 652.

decided *Clark's* case (1) would no doubt have applied a corresponding rule giving effect to the de facto position; and would accordingly have held that if, before the landlord covenanted to provide the relevant services, it was he and not the tenant who in fact provided them, there could not have been said to be a "transfer to the landlord from the tenant "of the burden" of providing them. Indeed the most forcible way in which the case was put for the tenants was that you cannot speak of a "transfer to the landlord "of a burden . . . previously borne by the tenant" when the burden in question was never borne by the tenant at any stage, but was borne by the landlords throughout, till 1943 de facto, and after 1943 de jure as well. Put in this way the argument sounds formidable. Nevertheless for my part I think it ill-founded. Before the obligation was assumed by the landlords there was a contingent burden on the tenant, and, therefore, upon the landlords' assumption of the obligation there was a transfer of a burden to them from the tenant; because, although de facto the landlords in the earlier period supplied hot water, etc., they could in that period at any moment have cut off the supply and forced the tenant to provide it for himself or go without. By the elimination of this risk in 1943 the tenant was emancipated from a disadvantage which can without abuse of language be described as a "burden," and one which but for what happened in 1943 would very likely from being contingent have become actual owing to the rise in fuel prices. In consequence of what then happened the tenant shed this burden, which settled on the shoulders of the landlords, having in its transit assumed the hard lineaments of a legally enforceable obligation. It may be said that this conclusion is in conflict with the decision in *Clark's* case (1) embodied in the judgment of Evershed L.J. which is a judgment of at least a majority of the court. In that judgment he appears to say that there is no transfer of burden except in so far as the alleged transferee thereof actually provides the services from the obligation to supply which the alleged transferor has been relieved. A possible interpretation of this statement, as has been noticed above, is one which identifies services which after the alleged transfer "are not" provided by the tenant, with services which he is legally incapacitated from providing, as in the case of lighting or cleaning the common stair. If *Clark's* case (1) decided no more than that it does not touch the present case. If, however, in *Clark's* case (1), the court is to be held to the literal scope of the words it used when it said "must be in "practice and are," then its decision, in my view, conflicts with that in *Miller's* case (2), where the factual element reflected in the words "and are" was assumed to be wholly immaterial and a transfer of the (contingent) practical burden was held sufficient per se to satisfy the sub-section. If so, this court is at liberty to follow either of these conflicting decisions, and I am of opinion that it ought to follow that in *Miller's* case (2).

---

(1) [1948] 1 K. B. 630.

The foregoing concerns the issue whether or not there was in this case a transfer to the landlords of a burden previously borne by the tenant. There remains to be considered the contention of the tenant, that, even if there was such a transfer, the increase of rent, on the facts of the present case, was not "in respect of" such transfer, as it has to be to attract the operation of the sub-section. The ground of this contention is the fact (and finding) that, when in 1943 the landlords raised the rent from 175*l.* to 250*l.*, they had either forgotten, or, at all events, did not advert to, the terms on which the previous tenant, Edwards, had held from them. This reasoning assumes that an increase of rent cannot be "in "respect of the transfer" of a burden unless the landlord increasing the rent consciously relates the two, the increase and the burden, to each other. I do not think this is a legitimate assumption. "In respect of" is a very comprehensive expression. Provided there is (*a*) an increase of rent, (*b*) not more than commensurate with the quantum of the burden transferred, and (*c*) substantially contemporary with its transfer, the words "in respect of the transfer" are, in my view, satisfied, and this accords with the observations of Scott L.J. in *Miller's* case (2) about the disturbance and readjustment of the equilibrium of the lease.

In the result I think, first, that the plaintiffs are entitled to succeed in their claim, not as to 43*l.* 15*s.* 0*d.* only, but prima facie as to 62*l.* 10*s.* 0*d.*; secondly, that the defendant's counterclaim should fail except in so far as the county court judge may decide that the burden transferred is over-valued at 75*l.* per annum. In such an event he may evaluate the plaintiffs' claim for one quarter's rent at something intermediate between 43*l.* 15*s.* 0*d.* and 62*l.* 10*s.* 0*d.*

(1) [1948] 1 K. B. 630.

(2) [1944] K. B. 734.

DENNING L.J. I agree with the judgments of my Lord and of Asquith L.J. It is as well to bear steadily in mind the facts of this case. The flat was let from 1935 to 1939 at 175*l*. a year. The landlords were then under no obligation to provide hot water, but they did in fact do so. The flat was empty from 1939 to 1943. Then it was let at 250*l*. a year, but with the significant difference that the landlords bound themselves to provide hot water. The cost of fuel and labour had, of course, greatly increased between 1939 and 1943; and, whilst in 1939 it was no doubt economically possible for the landlords to provide hot water free for his tenants, it may well have been economically impossible for them to do so in 1943 unless there was some increase in the rent. At any rate the tenant then agreed to pay 250*l*. a year for the flat. Now the tenant says that the increase from 175*l*. to 250*l*. was invalid. If his contention is correct it means that in return for 175*l*. a year he will not only get the benefits which the 1939 tenant got for that sum, but he will also get this additional benefit thrown in; he will be able to insist on the landlords providing hot water free of any cost to the tenant no matter how much the cost of fuel and labour has already increased or may hereafter increase, and he will be able to recover two years' over-payments at 75*l*. a year. It is difficult to suppose that the legislature intended not only to peg rents at the 1939 level, but also to enable a tenant to get additional benefits without extra payment. If I thought that the legislature foresaw the situation and nevertheless intended that result, I would, of course, give effect to it. But the question is whether it did so. Section 1, sub-s. 1, of course, pegs the rent at the 1939 level, but s. 2, sub-s. 3, does authorize the landlord to increase the rent in certain cases. The question is whether this is one of the cases in which an increase is authorized.

The courts have already done a good deal to define the scope of s. 2, sub-s. 3. Two things are clearly necessary. First, it is necessary to compare the terms of the present tenancy with the terms of the previous tenancy which existed when the standard rent was payable. The sub-section is quite clear on this point. The "terms" on which the dwelling-house is held must be on the whole "less favourable" or "not less favourable" than the previous terms. "Terms" here means terms which are binding by contract or imposed by statute. Secondly, it is necessary that the change in the terms should result in, or be the result of, a transfer of a burden or liability from one to the other. For this purpose the transfer need not be a contractual transfer, nor need the burden be a contractual burden. The sub-section is satisfied if the change of terms puts upon the one, as matter of practice, the burden of doing work which had previously fallen on the other.

In this case the first requisite is satisfied. The present terms are more favourable to the tenant than the previous terms because the landlords undertook a binding obligation to provide hot water, to remove refuse, and so forth. But was the second requisite satisfied ? Was the tenant previously under any " burden " which now falls on the landlords ? It is said that during the previous tenancy the landlords did in fact provide the hot water, and that therefore the tenant was under no burden. This is where the rub comes. I confess that according to the ordinary meaning of the word " burden " the tenant was under no burden previously to provide hot water. But neither were the landlords. There was no legal obligation on the landlords to provide hot water, and if they for any reason, good or bad, decided to cut it off, the tenant would have no legal ground of complaint. When the price of fuel rose the landlords would both legally and morally have been justified in saying that they would not provide hot water unless they were paid a contribution towards the increase in cost. The tenant was therefore under the contingent burden, as a matter of practice, of providing the hot water himself, or paying a contribution towards the increased cost, or going without. Under the changed terms all that burden falls on the landlords. No matter how much the price of fuel rises, no matter how difficult it is to obtain, the landlords can no longer cut off the hot water or ask the tenant for a contribution towards the increase in cost. The change of terms does therefore put on the landlords a burden which previously fell contingently on the tenant.

The question for decision in this case is whether we are at liberty to extend the ordinary meaning of " burden " so as to include a contingent burden of the kind I have described. Now this court has already held that this sub-section is to be liberally construed so as to give effect to the governing principles embodied in the legislation (*Winchester Court Ld.* v. *Miller* (1)) ; and I think we should do the same. Whenever a statute comes up for consideration it must be remembered

(1) [1944] K. B. 734.

that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon's* case (1), and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume *Eyston* v. *Studd* (2). Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

Approaching this case in that way, I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had would it not have put it on the same footing as an actual burden? I think it would. It would have permitted an increase of rent when the terms were so changed as to put a positive legal burden on the landlord. If the parties expressly agreed between themselves the amount of the increase on that account the court would give effect to their agreement. But if, as here, they did not direct their minds to the point, the court has itself to assess the amount of the increase. It has to say how much the tenant should pay "in respect of" the transfer

---

(1) (1584) 3 Co. Rep. 7a. (2) (1574) 2 Plowden, 465.

C. A.

1949

SEAFORD COURT ESTATES LD. *v.* ASHER.

Denning L.J.

of this burden to the landlord. It should do this by asking what a willing tenant would agree to pay and a willing landlord would agree to accept in respect of it. Just as in the earlier cases the courts were able to assess the value of the "fair "wear and tear" clause, and of a "cooker," so they can assess the value of the hot water clause and translate it fairly in terms of rent; and what applies to hot water applies also to the removal of refuse and so forth. I agree that the appeal should be allowed, and with the order proposed by Asquith L.J.

Appeal allowed.

Case referred to county court judge to determine whether the burden transferred to landlords is over-valued at 75l. per annum. If so, plaintiffs' claim to be correspondingly reduced. Counterclaim dismissed subject to any over-valuation.

Leave to defendants to appeal to House of Lords.

Solicitors: *Griffinhoofe & Brewster; Kennedy, Ponsonby and Prideaux.*

H. C. G.

C. A.

1949

May 24, 25, 26, 27; *June* 3.

Tucker, Somervell and Denning L.JJ.

SMITH AND SNIPES HALL FARM LD. *v.* RIVER DOUGLAS CATCHMENT BOARD.

Land drainage—River—Flooding—Agreement under seal by drainage board with landowner to widen, deepen and make good the banks of river and maintain completed work for all time—Contribution by landowner to cost of work—New banks unable to stand strain of greater inflow of water—Bursting of bank—Serious flooding and damage to crops—Duty of board—Liability of board to covenantee's successor in title and persons holding title under him—Covenant running with the land—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 78, *sub-s.* 1—*Land Drainage Act,* 1930 (20 & 21 *Geo.* 5, *c.* 44), *ss.* 6, 34.

In 1938, by an agreement under seal, the defendant catchment board, as the relevant drainage authority under the Land Drainage Act, 1930, covenanted with the owners of certain lands which were subject to flooding, situate between the Leeds and Liverpool Canal and the River Douglas, and adjoining the Eller Brook in the parish of Lathom, Lancashire, that in consideration of the landowners contributing to the cost the board would replace the then defective outfall from the Low Meadows, situated near the junction of the Eller Brook with the River Douglas, by a new outfall, widen and deepen, and make good the banks of, the Eller Brook, take over the control of the brook, and maintain for all time the work when completed. In 1940, Mrs. S., one of the covenantees under the said agreement, transferred her land, known as Low Meadows, to the first plaintiff, together with the benefit of the agreement, and in 1944 the plaintiff company was incorporated and rented the said land as yearly tenants under an oral agreement. From time to time breaches had occurred in the banks of the brook (which from reasons of economy had been constructed of soil taken from the bed of the brook, without a clay core) and had been repaired by the board, but in the autumn of 1946 the brook burst its banks and flooded the land of the plaintiffs to a depth of over five feet. On a claim by the plaintiffs against the defendant board for damages in tort and for breach of contract:—

Held, that the defendant board was in breach under the contract and that such breach had caused the damage complained of; that the language of the agreement was such that it affected the value of the land per se and showed an intention that the obligation should attach thereto, into whosesoever's hands the land should come; that the covenant by the board ran with the land and by virtue of s. 78 of the Law of Property Act, 1925, it could be enforced at the suit of the covenantee and her successors in title and of the persons deriving title under her or them.

Decision of Morris J. [1948] W. N. 414, reversed.

APPEAL from Morris J.

By an agreement under seal dated April 25, 1938, Mrs. Ellen Smith, then the owner of certain lands liable to flooding and known as Low Meadows, situated between the Eller Brook and the Douglas River in Lancashire, and ten other landowners in the locality, agreed with the defendant catchment board, as the relevant drainage board under the Land Drainage Act, 1930, that in consideration of the board's widening, deepening and making good the banks of the brook, taking over control thereof, and maintaining for all time the work when completed, they (the landowners) would contribute to the cost. In order that they should have the necessary powers under s. 6 and s. 34 of the Land Drainage Act, 1930, the board applied to the Minister of Agriculture and Fisheries to make the Eller Brook a "main river," which he did by varying the map of the catchment area under s. 5 of the Act. The material recitals contained in the said agreement were as follows: "Whereas (1) certain lands belonging to the "parties of the first eleven parts hereto (hereinafter called "the landowners) situate between the Leeds and Liverpool "Canal and the River Douglas and adjoining the Eller Brook "in the parish of Lathom in the county aforesaid are liable "to flooding. (2) The board is a drainage board duly con-"stituted under the Land Drainage Act, 1930, and the lands "subject to flooding lie within the catchment area of the "board. (3) A proposal has been made that the board in "order to improve the drainage of the land liable to flood "and to prevent future flooding should undertake the widen-"ing, deepening, improvement and future maintenance of the "Eller Brook from its junction with the River Douglas to "Brook Bridge, Carr Lane, Burscough aforesaid, to which the "board have agreed subject to the landowners paying a "proportion of the cost thereof. (4) The landowners have "agreed to contribute towards the cost of the works to be "carried out by the board as hereinafter contained, and "(5) For the purpose of giving effect hereto the board have "applied to the Minister of Agriculture and Fisheries to make "Eller Brook a 'main river' under the control of the board."

The work under the agreement was carried out by the board on the lines of a plan prepared by their engineer, and was practically completed by August 12, 1940. On April 1 of that year the first plaintiff, John Bruce Smith, took a conveyance from Mrs. Ellen Smith of her land, which was expressly stated to be conveyed with the benefit of the agreement of April 25, 1938. In May, 1944, the second plaintiffs, a company controlled by the first plaintiff, was incorporated and occupied the land in question under an oral agreement as yearly tenants. Flooding of a minor character, due to breaches of the banks of the brook still occurred from time to time, and in September, 1946, owing to the severe conditions which prevailed and the much greater volume of water which flowed into it, the brook burst its banks, and Low Meadows, of which some 250 acres had been brought under cultivation, were inundated and damage resulted.

The plaintiffs claimed damages (i) in tort and (ii) for breach of the contract of April 25, 1938, in that in order to save expense the defendants had constructed the banks of soil taken from the bed of the river, which contained a considerable amount of sand, and had failed to give the banks a clay core, so that they were inadequate to withstand the pressure of the greater volume of water flowing into the brook as a result of the drainage work. The plaintiffs contended that the covenant contained in the agreement of 1938 ran with the land, and that by virtue of s. 78 of the Law of Property Act, 1925 (1), it could be enforced by both the plaintiffs.

Morris J. gave judgment for the defendants. Applying the principles enunciated in *East Suffolk Rivers Catchment Board* v. *Kent* (2), he was of opinion that no liability in law attached to the board in tort, and that having made good the banks of the Eller Brook, though not as good as they might have made them, and having in fact done maintenance work on them, although that work was unsuccessful, there had been no breach of contract. In his view the contractual obligations of the board were not to be regarded as covenants running with the land and s. 78 of the Law of Property Act did not affect the question as to what were covenants relating to the land of a covenantee.

The plaintiffs appealed.

Gerrard K.C. and *Baucher* for plaintiffs.
Nield K.C. and *Youds* for defendants.

The arguments of counsel sufficiently appear from the judgments of the court.

TUCKER L.J. having stated the facts and read the material recitals in the agreement of April 25, 1938, continued: In so far as the plaintiffs' claim is based on breach of contract, it is alleged that by the agreement of April 25, 1938, the defendants agreed for a monetary consideration to execute certain works and to maintain for all time the work when completed, and that there being no specification incorporated in the agreement there was an implied obligation on the part of the defendant board to use reasonable care and skill in the execution and maintenance of the work, having regard to the purpose for which it was required. It is said, and I do not think this was contested, that the duty of the board under this contract, voluntarily entered into for a monetary consideration, is not to be measured by the standard to be taken for the purpose of ascertaining its liability in tort in the performance of its statutory powers under the Land Drainage Act, 1930. Its duty is accordingly not limited to avoiding the creation of new danger or damage in the performance of work which it had the power but was under no duty to carry out. Nor can it, I think, be relevant in this connexion to consider the financial resources of the board or its other commitments. The board must be presumed to have taken all these matters into account before it fixed the contributions to be paid by the landowners as consideration for its undertaking to perform the work and maintain it for all time. I think, therefore, it is clear that the plaintiffs are right in their contention as to the measure of the defendants' duty under the contract. I pass, therefore, to consider whether the plaintiffs established a breach of this duty.

---

(1) Law of Property Act, 1925, s. 78, sub-s. 1: "A covenant "relating to any land of the "covenantee shall be deemed to "be made with the covenantee "and his successors in title and "the persons deriving title under "him or them, and shall have "effect as if such successors and "other persons were expressed."

(2) [1941] A. C. 74, 86, 95, 102, 104 and 106.

[His Lordship then referred to the evidence of the experts called on either side, and also to the minutes of the defendant board in which it was recorded that the board's engineer had reported that the bank was " a bad one under any conditions." He continued :] There was some rather vague evidence given with regard to the difficulty of obtaining hard core and the increased cost which would have resulted from its use, but it fell far short of what would have been required to prove that the board had taken all steps which could reasonably have been expected of them in order to perform their contractual obligations, nor did the evidence establish that the rainfall in the months preceding September, 1946, was such that properly constructed banks could not have withstood the strain. That there would have been some overflow over the banks is, of course, a very different matter from the bursting of the banks. Having regard to the effect of the evidence to which I have already referred, it appears to me to be clear that the board were in breach of their contractual duty, and that a more detailed reference to the evidence is not called for.

On this aspect of the case Morris J. expressed himself as follows : " In construing the contract, it is, in my judgment, " relevant to have in mind the general position and powers " of the board. It is also pertinent to note that the contract " does not lay down any details as to methods to be used or " of material to be used or of standards to be attained. The " contract can hardly mean that the board were guaranteeing " that there would be no future flooding, nor can it mean that

C. A.

1949

SMITH AND SNIPES HALL FARM LD. v. RIVER DOUGLAS CATCHMENT BOARD.

Tucker L.J.

"the board were undertaking to do the work in the most "expensive manner, or with the surest and best methods. "If the parties had wished to stipulate, for example, for a "clay core in the banks of the Eller Brook, they could have "done so. The contractual obligations are expressed some-"what generally, and the board were not presented with "specifications of requirements. The phrase 'make good the "'banks' is not one of precision. The board did proceed to "widen and deepen, and they did make good the banks of the "Eller Brook. It is true that they did not make the banks "as good as they might have been, or as good as they needed "to have been in order to withstand severe flood conditions, "but they endeavoured to make good the bank. Similar con-"siderations apply in regard to the suggestion that the board "failed to 'maintain' the work to Eller Brook. When the "incidents occurred prior to September, 1946, the board "did not fail to act, but undertook certain remedial measures. "The fact that ultimately it was decided that the only effective "measure was to put in a clay core does not, in my judgment, "establish that previously there had been a failure to "maintain." Then the learned judge, after referring to the particulars in paragraph 4 of the statement of claim, where it is said that in the maintaining of the work after completion, materials suitable to the work of maintenance were not used, proceeded: "While it is true that the work of maintenance "undertaken before September, 1946, did not succeed in "preventing the bank from bursting in the adverse con-"ditions which developed, it does not follow from this that "the board must be convicted of a failure to maintain. Though "the board was unsuccessful in its labours, the evidence does "not suggest that the board was trifling with the situation "or that it was heedless or inactive. It may well be, and "perhaps experience has shown, that in the long run it would "have been wiser and cheaper to have earlier employed the "more costly measures which later were adopted. But the "contract did not contain a guarantee that the new bank "would stand all tests. A failure to maintain the completed "work is, therefore, not shown." I am not quite clear from this what in the learned judge's view was the measure of the defendants' obligations under the contract, but he appears to have absolved the board from liability on the ground that it was not trifling with the situation or heedless or inactive. However this may be, for the reasons already stated, I think on the undisputed evidence and the judge's findings the board were in breach under the contract, and that such breach caused the damage complained of.

It remains to consider whether, in these circumstances, the plaintiffs, or either of them, can sue in respect of this breach. It is said for the defendants that the benefit of the covenant does not run with the land so as to bind a stranger who has not and never had an interest in the land to be benefited and there being no servient tenement to bear the burden. Further, it is contended that such a covenant must by the terms of the deed in which it is contained relate to some specific parcel of land, the precise extent and situation of which can be identified by reference to the deed alone. It is first necessary to ascertain from the deed that the covenant is one which "touches or concerns" the land, that is, it must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit thereof should run with the land. In this case the deed shows that its object was to improve the drainage of land liable to flooding and prevent future flooding. The location of the land is described as situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller Brook. In return for lump sum payments the board covenants to do certain work to the banks of the Eller Brook, one of such banks being in fact situate upon and forming part of the plaintiffs' lands, and to maintain for all time the work when completed. In my view the language of the deed satisfies both tests. It affects the value of the land per se and converts it from flooded meadows to land suitable for agriculture, and shows an intention that the benefit of the obligation to maintain shall attach thereto into whosesoever hands the lands shall come.

With regard to the covenantor being a stranger the case of *The Prior* is referred to in *Spencer's* case (1), in these words: "In the case of a grandfather, father and two sons, the grandfather being seised of the manor of D, whereof a chapel was parcel: a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week

(1) (1368) 1 Sm. L. C. 10th ed. pp. 56, 73, 13th ed. 51, 65, 73.

"in his chapel, parcel of the said manor, for the lords of the "said manor and his servants, etc.; the grandfather did "enfeoff one of the manor in fee, who gave it to the younger "son and his wife in tail; and it was adjudged that the "tenants in tail, as terre-tenants (for the elder brother was "heir), should have an action of covenant against the prior, "for the covenant is to do a thing which is annexed to the "chapel, which is within the manor, and so annexed to the "manor, as it is there said." The notes to *Spencer's* case (1) state: "When such a covenant (namely, covenants running "with the land made with the owner of the land to which they "relate) is made it seems to be of no consequence whether the "covenantor be the person who conveyed the land to the "covenantee or be a mere stranger." In volume 4 of Bythewood & Jarman's Conveyancing, 4th ed., at p. 268, the following passage from the third report of the Real Property Commissioners is quoted with approval: "Expressions found "in some books would lead to the opinion that, in considering "this class of covenant with reference to the benefit of them, "there is a distinction between those cases where the "covenantor is a party by whom the estate is, or has been, "conveyed, and those in which he is a stranger to the estate. "We think the authority of Lord Coke on this point (which is "express (Co. Litt 384*b*)) sufficient to warrant us in disregarding "this distinction."

In *Rogers* v. *Hosegood* (2), Farwell J. in a passage where he refers, amongst others, to *The Prior's* case—and I quote from Farwell J.'s judgment because, although this case went to the Court of Appeal, his judgment was approved, and the Court of Appeal had to deal with a rather different point—after stating what are the requirements in order that the covenant may run with the land, proceeds: "It is not contended "that the covenants in question in this case have not the first "characteristic, but it is said that they fail in the second. "I am of opinion that they possess both. Adopting the "definition of Bayley J. in *Congleton Corporation* v. *Pattison* (3) "the covenant must either affect the land as regards mode of "occupation, or it must be such as per se, and not merely "from collateral circumstances, affects the value of the "land. It is to my mind obvious that the value of Sir J. "Millais's land is directly increased by the covenants in

(1) (1368) 1 Sm. L. C. 10th ed. pp. 56, 73, 13th ed. 51, 65, 73.

(2) [1900] 2 Ch. 388, 395.

(3) (1808) 10 East. 130, 135.

C. A.
1949
Smith and Snipes Hall Farm Ld. v. River Douglas Catchment Board.
Tucker L.J.

"question. If authority is needed, I would refer to *Mann* v. "*Stephens* (1), a case very similar to the present; *Vyvyan* v. "*Arthur* (2); *The Prior's* case (3); *Fleetwood* v. *Hull* (4); "*White* v. *Southend Hotel Co.* (5). I see no difficulty in "holding that the benefit of a covenant runs with the land "of the covenantee, while the burden of the same covenant "does not run with the land of the covenantor."

In this state of the authorities it seems clear, despite some dicta tending to the contrary view, that such a covenant if it runs with the land is binding on the covenantor though a mere stranger, and that this point will not avail the defendant board. As to the requirement that the deed containing the covenant must expressly identify the particular land to be benefited, no authority was cited to us and in the absence of such authority I can see no valid reason why the maxim "Id certum est quod certum reddi potest" should not apply, so as to make admissible extrinsic evidence to prove the extent and situation of the lands of the respective land owners adjoining the Eller Brook situate between the Leeds and Liverpool Canal and the River Douglas.

On this part of the case the learned judge said: "In my "judgment the contractual obligations of the board are not "to be regarded as covenants running with the land. They "do not differ from obligations which by agreement a firm of "contractors might agree to discharge in reference to some "particular land. The catchment board do not own any "land and there is no question of any obligation in relation "to or connexion with any land of theirs. The circumstances "are different from those in the case of *Shayler* v. *Woolf* (6). "Section 78 of the Law of Property Act does not affect the "question as to what are covenants relating to the land of a "covenantee. Furthermore, much of the reasoning of "Lindley L.J. in *Austerberry* v. *Corporation of Oldham* (7), "is applicable. Although work might have to be done on the "land which formerly belonged to Mrs. Ellen Smith, and now "belongs to the first plaintiff, equally it might be that for the "effectual preventing of flooding of low meadows work on "the banks of Eller Brook at some place considerably higher

---

(1) (1846) 15 Sim. 377.

(2) (1823) 1 B. & C. 410; 25 R. R. 437.

(3) 1 Sim. L. C. 10th ed. 55, 13th ed. 51, 65, 73.

(4) (1889) 23 Q. B. D. 35.

(5) [1897] 1 Ch. 767.

(6) [1946] Ch. 320.

(7) (1885) 29 Ch. D. 750, 780, 781.

"up the brook might have to be undertaken." I do not find anything in the judgments in *Austerberry* v. *Corporation of Oldham* (1) which conflicts with the law as I have endeavoured to set it out above, and I have accordingly arrived at the conclusion that the covenant by the board in the agreement of April 25, 1938, is one which runs with the land referred to therein, which land is capable of identification, and that it is binding on the defendant board; and, further, that by virtue of s. 78 of the Law of Property Act, 1925, it can be enforced at the suit of the covenantee and her successors in title and the persons deriving title under her or them, so that both the plaintiff Smith and the plaintiff company can sue in respect of the damage resulting to their respective interests therein by reason of the defendants' breach of covenant.

For these reasons, I would allow this appeal, and remit the assessment of damages to an official referee. Having regard to the conclusion I have reached on the contractual aspect of the case, I find it unnecessary to express any view with regard to the application of the principles laid down in *East Suffolk Catchment Board* v. *Kent* (2), to the work carried out by the defendant board, had it been performed solely in the exercise of its statutory powers and in the absence of the agreement of April, 1938.

SOMERVELL L.J. The plaintiffs in this action claimed in contract and in tort for damages done by floods in the early part of September, 1946, caused by water flowing through a breach made in the walls containing a stream or river known as the Eller Brook. The learned judge held that the claim under both heads failed. He considered first the claim in tort. I have come to the conclusion that the claim in contract succeeds, and on that view it is unnecessary to consider the claim in tort.

The first question is: what was the obligation of the defendants under the agreement? They had, in my opinion, to construct banks which might reasonably be expected both by their height and their strength to prevent flooding. The construction of such a bank was the purpose for which the landowners paid their money. If they had been told that the bank to be constructed was one doomed to failure in the event of floods, or a bad bank under any conditions, they would presumably have kept their money for some other and more

(1) 29 Ch. D. 750, 780, 781.

(2) [1941] A. C. 74.

useful purpose. The phrase "doomed to failure" was one used of the outer banks, as constructed, by Mr. Waters, one of the plaintiffs' witnesses. The learned judge saw no reason to doubt the general reliability of Mr. Waters and of Mr. Ashcroft, the other witness on this subject for the plaintiffs. That does not mean he accepted everything they said. The evidence on both sides as to these banks can be shortly summarized. Mr. Ashcroft said the outer banks had no reasonable chance of standing up to their work. Mr. Waters regarded the banks as inadequate, as doomed to failure. So far as the defendants are concerned, when there was a burst in January, 1944, a statement appears in their minutes that "the bank is a bad one under any conditions." Mr. Eaton, the defendants' engineer, agreed with that. He said of the work when originally done: "I knew it was dangerous," he adds, "but I was well satisfied with what we had done." He assented to a leading question put by counsel for the defendants that the bank was the best that could be produced with the money available. The question of the financial resources of the defendants seems to me to have little or no relevance to their liability under the agreement. If a party, whether a catchment board or individual, undertakes for consideration to produce a certain result, it is no answer, if a claim is based on his failure to produce that result, for him to show that he had not the money. Everyone was agreed that with extra expense a reasonably strong bank could have been constructed. This is in fact now being done. If I have rightly construed the contract, then, in my view, there was on this evidence, as accepted by the learned judge a breach. The learned judge held that whatever might be the liability under the agreement the plaintiffs could not sue upon it. It was not therefore necessary for him to deal in detail with the question of breach. He expresses his opinion that there was no breach, but I think, though I am not certain, that this was on the basis of a different construction of the contract.

If, therefore, Mrs. Ellen Smith had remained in possession, she could have recovered damages. Does the covenant run with the land, so that the first plaintiff can sue on it? If the answer to this is "Yes," has s. 78 of the Law of Property Act, 1925, enabled the second plaintiffs to sue in that that section covers not only successors in title of the covenantee but persons deriving title under either? We are concerned here with the question whether the benefit of a covenant runs with the land benefited as against the original covenantor. The learned judge said this: "In "my judgment the contractual obligations of the board are "not to be regarded as covenants running with the land. "They do not differ from obligations which by agreement "a firm of contractors might agree to discharge in reference "to some particular land." In the ordinary case a firm of contractors who had undertaken to construct and thereafter maintain certain works would receive for the latter service an annual sum. Such a contract clearly would not run with the land so as to bind a transferee to continue to pay the annual sum. The defendants also differ from a firm of contractors, in that they have a statutory power to do such work as is in question here on other people's land. If one seeks the intention of the parties in the agreement, I should have thought it was plain that the benefit of the covenant was intended to run with the land. If it was not, a landowner who sold a month after the agreement had no legal right which he could transfer and claim value for. If one assumes a single landowner who transferred the land, the defendants, having taken his money, would be under no liability to the transferee, and I do not see how the transferor could establish any damage. The undertaking is to maintain "for all time "the work when completed," and not to maintain "so long "as you remain owner."

In *Rogers* v. *Hosegood* (1) Farwell J. said: "Covenants "which run with the land must have the following "characteristics: (1.) they must be made with a covenantee who has an interest in the land to which "they refer; (2.) they must concern or touch the land." Both these conditions seem to me to be satisfied. The learned judge goes on to say that in addition there must be an intention that the covenant should so run. I have already dealt with this. It is said, rightly, that the land intended to be protected must be described so as to be ascertainable with reasonable accuracy. It was submitted that it was not so described in this case. It is true that evidence outside the instrument itself would be necessary to show what were the parcels covered by the agreement. This was true of the agreement in *Rogers* v. *Hosegood* (1), where the covenant was with named owners (a partnership) . . . . "to all or any of

---

(1) [1900] 2 Ch. 388, 395.

C. A.

1949

Smith and Snipes Hall Farm Ld. v. River Douglas Catchment Board.

Somervell L.J.

"their lands adjoining or near to the said premises." There are many cases in which the lands to be benefited are not identified by descriptions with reference to a map or plan. There is another point. What is the scope of the covenant? Suppose the breach through which A's land was damaged occurred in the banks where they run through B's lands, can A sue? In my view, he could. Under the agreement the lands to be drained and protected are treated as a unit, though, of course, not in single ownership. The covenant as to widening and deepening is clearly a covenant with each owner that the brook will be widened and deepened throughout the whole length covered by the agreement and not merely that portion of the brook which adjoins his lands.

On the question whether the covenant ran with the land Mr. Nield submitted that if the benefit of a covenant is to run with the land it must either be with a previous owner, or as against the owner of another parcel. The authorities do not seem to me to support these propositions. Mr. Nield also relied on *Formby* v. *Barker* (1). That case was dealing with a different point. In that case a vendor had parted with the whole of his land, the purchaser agreeing to restrict its user. The vendor's executor sought to enforce the covenant. It was held that the covenant was personal and the principle of *Tulk* v. *Moxhay* (2), inapplicable. In that case the vendor having parted with all his land, there was no land with which the benefit of the covenant could run. The sentences on which Mr. Nield relied must be read with regard to the type of covenant with which the case was concerned. On the basis that the benefit of the covenant ran with the land, Mr. Nield did not argue that the cause of action was restricted to the first plaintiff. I therefore think that the appeal should be allowed, and that the claim based on the agreement succeeds. It is unnecessary to consider what would have been the position if the plaintiffs had had no contract to rely on. The learned judge considered that the claim would have failed on the principles laid down in *East Suffolk Rivers Catchment Board* v. *Kent* (3). Various questions might have arisen. Was there a failure to take reasonable or ordinary care? Does the main principle in the *East Suffolk* case apply where damage is caused by a negligent defect in works constructed? If any duty was owed to the plaintiffs it might well be less onerous than the

(1) [1903] 2 Ch. 539.

(2) (1848) 2 Ph. 774.

(3) [1941] A. C. 74.

duty which the defendants assumed under the contract. Was the danger to the plaintiffs' land increased or diminished, or increased in some respects and diminished in others ? I express no opinion on these points beyond saying that the issues raised would, in my opinion, have not been easy.

DENNING L.J. There is in Lancashire a river called Eller Brook, which is liable to overflow its banks and flood the adjoining land. In 1938, in order to prevent the flooding, eleven owners of land through which the river ran made an agreement with the local catchment board, whereby the board undertook to widen, deepen and make good the banks of the river, and thereafter to maintain them, and the landowners paid a contribution towards the cost. The board did the work and practically completed it by 1940, but they did it so unskilfully that, in the opinion of experts, it was from the first doomed to failure. The landowners, of course, did not know this and set about cultivating the land. The low meadows, which had been rough marshland, were broken up and brought under the plough. Crops were sown and harvested. But the banks of the river were not strong enough to stand serious floods. In 1944 they burst. The breach on that occasion was soon closed, but the board's engineer was aware of the danger. He reported to the board that "the bank is a bad "one under any conditions." In 1945 there was another burst near by, and he reported that "this bank is largely "composed of sand. I propose to put a machine on to "strengthen it as soon as one is available." But apparently he did nothing, or at any rate nothing effective. The landowners and their tenants went on cultivating the land. They did not know that the banks were doomed to failure. Then in 1946 the worst happened. Serious floods arose, the banks burst, the fields were flooded, and the crops ruined. This action is brought by a tenant of the fields against the board to recover the value of the crops he has lost. The present owner joins in the action, claiming his loss of rent, but the substantial claim is by the tenant company.

On those facts it is my opinion that the board broke their contract. It was an implied term that they should do the work with reasonable care and skill, so as to make the banks reasonably fit for the purpose of preventing flooding. The proper way of doing this, according to the experts, was to put a clay core in the banks, or to make them very much wider, but they did not do either. It may be that the board had not sufficient funds available to carry out such works; but that seems to me to be an irrelevant consideration, or, at any rate, just as irrelevant in the case of a public board as in the case of a private contractor. No private contractor who was engaged to make works for a specific purpose could excuse himself for bad results by saying that he had not sufficient money to erect proper works. It follows, therefore, that if the original landowner with whom the agreement was made had himself cultivated the fields, and suffered damage by the breach, he could recover from the board. But he sold the land and he has suffered no damage. The damage has been suffered partly by the man who purchased the land, but principally by the tenants, and the question is whether they can sue on the contract.

Mr. Nield says that the plaintiffs cannot sue. He says that there is no privity of contract between them and the board, and that it is a fundamental principle that no one can sue upon a contract to which he is not a party. That argument can be met either by admitting the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 (*Tweddle* v. *Atkinson* (1), and reached its full growth in 1915 (*Dunlop* v. *Selfridge* (2)). It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the merits. It is upon this principle, implicit if not expressed (i.) that the courts, ever since 1368, have held that a covenant made with the owner of land for its benefit can be enforced against the covenantor, not only by the original party, but also by his successors in title. (See *The Prior's* case, which is set out by Lord Coke in his work on Littleton,

(1) (1861) 1 B. & S. 393. (2) [1915] A. C. 847.

at p. 384a, and in his report of *Spencer's* case (1)); (ii.) that the Courts of Common Law in the seventeenth and eighteenth centuries repeatedly enforced promises expressly made in favour of an interested person; (See *Dutton* v. *Poole* (2), approved by Lord Mansfield in *Martyn* v. *Hind* (3)); (iii.) that Lord Mansfield held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract; (See *Rabone* v. *Williams* cited in *George* v. *Clagett* (4)); and (iv.) that Lord Hardwicke decided that a third person is entitled to sue if there can be spelt out of the contract an intention by one of the parties to contract as trustee for him, even though nothing was said about any trust in the contract, and there was no trust fund to be administered. (See *Tomlinson* v. *Gill* (5).)

Throughout the history of the principle the difficulty has been, of course, to say what is sufficient interest to entitle the third person to recover. It has sometimes been supposed that there must always be something in the nature of a "trust" for his benefit. (See *Vandepitte's* case (6).) But this is an elusive test which does not explain all the cases, and it involves the trustee being made a nominal party to the action either as plaintiff or defendant, unless that formality is dispensed with, as it was in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford Ld.* (7). The truth is that the principle is not so limited. It may be difficult to define what is a sufficient interest. Whilst it does not include the maintenance of prices to the public disadvantage, it does cover the protection of the legitimate property, rights and interests of the third person, although no agency or trust for him can be inferred. It covers, therefore, rights such as these which cannot justly be denied; the right of a seller to enforce a commercial credit issued in his favour by a bank, under contract with the buyer; the right of a widow to sue for a pension which her husband's employers promised to pay her under contract with him; (See *Dutton* v. *Poole* (2) and cf. *In re Schebsman* (8)); or the right of a man's servants and guests to claim on an insurance policy, taken out by him against loss by burglary which is expressed to cover them; cf. *Prudential Staff Union* v. *Hall* (1). In some cases the legislature itself has intervened, as, for instance, to give the driver of a motor car the right to sue on an insurance policy taken out by the owner which is expressed to cover the driver. But this does not mean that the common law would not have reached the same result by itself.

---

(1) 1 Sm. L. C. 10th ed. 55, 13th ed. 51, 65, 73.

(2) (1677) 2 Lev. 210.

(3) (1776) 2 Cowp. 443.

(4) (1797) 7 Term R. 359.

(5) (1756) Ambler 330.

(6) [1933] A. C. 70, 79.

(7) [1919] A. C. 801.

(8) [1944] Ch. 83, 103, 104.

The particular application of the principle with which we are concerned here is the case of covenants made with the owner of the land to which they relate. The law on this subject was fully expounded by Mr. Smith in his note to *Spencer's* case (2) which has always been regarded as authoritative. Such covenants are clearly intended, and usually expressed, to be for the benefit of whomsoever should be the owner of the land for the time being; and at common law each successive owner has a sufficient interest to sue because he holds the same estate as the original owner. The reason which Lord Coke gave for this rule is the reason which underlies the whole of the principle now under consideration. He said in his work upon Littleton that it was "to give damages to the party grieved." If a successor in title were not allowed to sue it would mean that the covenantor could break his contract with impunity, for it is clear that the original owner, after he has parted with the land, could recover no more than nominal damages for any breach that occurred thereafter. It was always held, however, at common law that, in order that a successor in title should be entitled to sue, he must be of the same estate as the original owner. That alone was a sufficient interest to entitle him to enforce the contract. The covenant was supposed to be made for the benefit of the owner and his successors in title, and not for the benefit of anyone else. This limitation, however, was, as is pointed out in Smith's Leading Cases, capable of being "productive of very serious and disagreeable consequences," and it has been removed by s. 78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title, "and the persons deriving title "under him or them" and shall have effect as if such successors "and other persons" were expressed.

The covenant of the catchment board in this case clearly relates to the land of the covenantees. It was a covenant to do work on the land for the benefit of the land. By the statute, therefore, it is to be deemed to be made, not only with the original owner, but also with the purchasers of the land and their tenants as if they were expressed. Now if they were expressed, it would be clear that the covenant was made for their benefit; and they clearly have sufficient interest to entitle them to enforce it because they have suffered the damage. The result is that the plaintiffs come within the principle whereby a person interested can sue on a contract expressly made for his benefit.

---

(1) [1947] K. B. 685, 689, 690.

(2) 1 Sm. L. C. 10th ed. 55, 13th ed. 51, 65, 73.

I would not wish to leave this subject without referring also to s. 56 of the Law of Property Act, 1925, which says that a person may take the benefit of any covenant or agreement respecting land or other property, although he may not be named as a party to the instrument. That section is no doubt, as Lord Greene has said, confined to cases when the person seeking to take advantage of it is a person "within "the benefit" of the covenant or agreement; (See *White* v. *Bijou Mansions* (1)); but, subject to that limitation, there is no reason why the section should not be given its full scope, just as Lord Dunedin was prepared to give full scope to its narrower predecessor, s. 5 of the Real Property Act, 1845. (See *Dyson* v. *Forster* (2).) Section 56 means, therefore, that a person may enforce an agreement respecting property made for his benefit, although he was not a party to it. So construed it is a clear statutory recognition of the principle to which I have referred and it is applicable to this case. If the principle had been canvassed in *In re Miller's Agreement* (3), it should, I think have been held there that the daughters had a right at common law to sue for their pension, a right which was reinforced by s. 56. I cannot believe that the covenantors there could break their contract with impunity. So much for the question of principle.

Mr. Nield did urge that the benefit of the covenant should not run with the land here because there was no clearly defined piece of land to which it was attached. It is true that the agreement did not describe the lands by metes and bounds, but it did give a description of them which was capable of being rendered certain by extrinsic evidence; and that is sufficient. Id certum est quod certum reddi potest. Mr. Nield also argued that there was no servient tenement. But

(1) [1938] Ch. 351, 365.

(2) [1909] A. C. 98.

(3) [1947] Ch. 615.

C. A.

1949

SMITH AND SNIPES HALL FARM LD. *v.* RIVER DOUGLAS CATCHMENT BOARD.

Denning L.J.

that is only material when there is a question whether the burden of a covenant runs with the land. This is a question of the benefit running, and ever since *The Prior's* case (1) it has been held that the covenantor is liable because of his covenant given to the owner of the dominant tenement and not because of his relationship to any servient tenement. In my opinion, therefore, the board are liable to the plaintiffs in damages for breach of covenant. It is thus unnecessary to consider whether they are liable in tort, but I will add a word about it. The decision of the House of Lords, in the *East Suffolk* case (2), shows that, in the absence of a contract, a catchment board is under no duty to exercise its powers with efficiency or dispatch or at all; but it also shows that if it does exercise its powers it must use reasonable care not to injure persons likely to be affected by its operations. The present case is very different from that one, because here the landowners, in consequence of the works done by the board, ploughed up the land and cultivated the fields; and in the result suffered damage which they would not have done if the board had done nothing, for in that case they would have had no crops there. The decision of the House of Lords does show, however, that, in considering whether the board broke its duty in tort, it is material to inquire into the expense of the works which it is said they ought to have constructed. An adjacent landowner must not be too critical if the board prefers thrift to efficiency, I suppose on the principle that he should not look a gift horse in the mouth and must be prepared to take it with some faults. But the duty in contract is a very different thing. There is no question of a gift horse there. The landowner paid his contribution in return for the board's promise, and they are in duty bound to fulfil it. I agree, therefore, that the appeal should be allowed.

Appeal allowed.
Damages remitted for assessment.
Leave to appeal to House of Lords.

Solicitors for plaintiffs: *Ellis & Fairbairn.*

Solicitors for defendants: *Norton, Rose, Greenwell & Co., for A. H. Jolliffe, Preston.*

---

(1) 1 Sm. L. C. 10th ed. 55, 13th ed. 51, 65, 73.

(2) [1941] A. C. 74.

A. W. G.

Applied. TURNER *v.* ARDING & HOBBS, LTD. [1949] 2 All E.R. 911.

STOWELL *v.* THE RAILWAY EXECUTIVE.

1949
June 1, 2.

Lynskey J.

Railways—Negligence—Injury to person meeting railway passengers at Paddington station—Invitee or licensee—Liability of Railway Executive.

On March 30, 1948, the plaintiff, a surgeon practising in London, drove in his own car to Paddington station to meet members of his family who were arriving there by train, and to convey them to his home. While walking along the arrival platform he slipped and fell upon a patch of oil and was injured. He alleged negligence by the Railway Executive, their servants or agents, and claimed damages.

Held, the plaintiff was an invitee. The duty of the defendants was to protect him from any "unusual danger," i.e., danger unusual from the point of view of the particular invitee. They had failed to do so, and were liable.

ACTION tried by Lynskey J.

The plaintiff was a surgeon carrying on practice in London. On March 30, 1948 (the day after Easter Monday), shortly before 5 p.m., he drove in his own car accompanied by his wife to Paddington station for the purpose of meeting his daughter and her family who were arriving there by train from Cornwall, and conveying them and their luggage to his home. The plaintiff entered the station by means of the taxi rank and roadway between numbers 8 and 9 platforms, to which access was obtained without a platform ticket being required. After the train had drawn in, the plaintiff walked along the arrival platform, number 9, looking out for his daughter. While doing so, he slipped upon a patch of some oily substance, fell to the ground and was injured. At the time the platform was crowded with travellers returning from the Easter holiday.

At 2.12 a.m. the same morning a fish train had arrived at number 9 platform. The fish was packed with ice in boxes with slats at top and bottom through which water and fish oil could leak on to the platform during the process of unloading from the train. Railway servants have instructions, after fish traffic has been cleared, to clean the platform with a "squeegee," then to sweep it, and finally to cover over with sand any remaining damp patches.

Humfrey Edmunds for the defendants. The plaintiff was in the position of a licensee at Paddington station. The

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

defendants had not a sufficient interest in the plaintiff's business upon their premises so as to make him an invitee. Therefore the duty of the defendants was to avoid exposing the plaintiff to a concealed danger, known to them and not reasonably discoverable by him. In this case, if there was a danger, it was an obvious one. Where a danger is obvious, the licensee must look out for himself. A licensee must take the premises as he finds them. That situation is not affected by the fact that the plaintiff was a licensee among a crowd of invitees. A licensee coming upon premises for the first time is not entitled to assume that the ground is safe to walk upon.

Counsel referred to *Fairman* v. *The Perpetual Investment Building Society* (1); *Mersey Docks and Harbour Board* v. *Procter* (2); *Anderson* v. *The Guinness Trust* (3); and *Jacobs and Another* v. *The London County Council* (4).

Gilbert Dare for the plaintiff. The plaintiff was an invitee within the principle of *Indermaur* v. *Dames* (5). He was a person on lawful business in which both he and the defendants had a sufficient interest, viz., the removal of railway passengers and their luggage from railway premises. It is immaterial whether the service is performed by a servant or agent of the passengers or by a third party. This is a stronger case than *Watkins* v. *Great Western Ry. Co.* (6) where the railway company was held liable for injury to a person merely accompanying a passenger and serving no interest of the railway's.

Even if the plaintiff was a licensee, the defendants had a duty to protect him from a known and anticipated danger. They must have known that the fish train had arrived. They did not take sufficient care to clean the platform and guard against a danger of which they were aware.

LYNSKEY J. In this case Mr. Thomas Edmund Alexander Stowell, who is a surgeon, a Doctor of Medicine and a Fellow of the Royal College of Surgeons in England, and practises his profession at Sussex Gardens in London, is claiming damages from the Railway Executive in respect of an accident which happened to him on March 30, 1948, shortly after five o'clock in the evening at the defendants' railway station at Paddington on platform number 9. [His Lordship here

(1) [1923] A. C. 74.
(2) [1923] A. C. 253.
(3) [1949] 1 All E. R. 530.
(4) [1949] 1 K. B. 685.
(5) (1866) L. R. 1 C. P. 274.
(6) (1877) 37 L. T. 193.

described the circumstances in which Mr. Stowell was injured, and continued :]

The case for the defendants is that they have a perfect system. I do not think I have ever been concerned in a railway case either at the bar or on the bench where the evidence has not always been that the railway company had a perfect system. I accept that it is their practice here. The case here is that in Paddington station on this particular morning of March 30 a fish train came into number 9 platform. There had been a fish train on number 8 platform before that and it is agreed that when these fish trains arrive the fish are packed in boxes in which the fish are not completely enclosed but which are made with slats top and bottom and with closed ends. The result is, and probably the desired result is, that the boxes of fish are apt to allow the water and oil to drain out. According to the answers to interrogatories sworn to by the defendants, both slime and oil escape from the boxes, and when they are being handled at the railway station some are loaded direct from the vans on to the lorries which are waiting to receive them but others, apparently, are loaded on to open trucks with the result that again, as is admitted by the defendants in their answers, one gets water and slime and oil on the platform. But, say the defendants, we realize that may be a danger to persons using our station and because of that when the night traffic is cleared and when the platform is free of obstruction we then squeegee the platform, that is to say we remove from the platform by means of squeegees all water and other liquids which may be upon it and having done that first of all we then have the platform swept by three sweepers who go the whole length of the platform. When that is done three porters go over the platform again and if there are any wet or damp patches on the platform those are sanded over with a fine sand which helps not only to dry the damp portion of the platform but also acts as a grip on that surface, and prevents people from slipping. The defendants say that all these precautions were taken on this particular day. In proof of this they have called before me the assistant station master, the inspector from what has been termed the "early shift" and also the inspector from the "second shift," and they have also called before me two of the porters who were actually concerned in clearing this platform.

If these practices had been carried out on that day and carried out efficiently, obviously there could have been no damp patch containing an oily substance which could afford any danger to Mr. Stowell, and I have to make up my mind whether I am satisfied that shortly after five o'clock in the evening there was a patch on the platform containing oil or grease upon which Mr. Stowell in fact fell.

I have his evidence and the evidence of his wife. I do feel that Mr. Stowell was in some respects inclined to exaggerate. I am not at all satisfied that there was a large patch of oil at the engine end of the platform. There may have been some dampness there or some darkness of the platform due to the effect of previous dampness—I do not know. I am not satisfied that that existed and if it had existed it must have been seen by the Railway Executive officials.

I am satisfied, on the other hand, that he fell and that by that fall his trousers were stained and his boot was stained. I accept the evidence of himself and his wife and daughter that they saw these stains and that these stains were of an oily nature. I am satisfied that he fell as a result of stepping on a patch of oil or grease on the platform and that the defendants in fact at all material times had ample opportunity of knowing of the existence of that patch. They told me they had about forty porters receiving every train. One knows that some of the porters dash up at the last moment just as the train is drawing in. On the other hand one knows that there are always a number on the platform waiting for the train to arrive. These men and the inspectors ought to have seen that patch if it was there and they should have taken steps to have had it removed right away or put some guard around it if it was there and they had seen it. That was not done and it seems to me that I am bound to find on the evidence that a patch was there on this occasion. I am equally bound to find that the defendants had ample opportunity of knowing the patch was there and if they or their servants had been sufficiently careful they would have seen it was there and would have taken steps to remove it before any passenger was injured thereby.

In these circumstances it seems to me that I am bound to hold that Mr. Stowell did slip and fall as a result of a wet slippery patch on platform number 9 and I am bound to hold also that that patch ought not to have been there, and that is admitted by the defendants. If they and their servants had taken proper care that patch could have been removed or at least rendered innocuous to passengers on the platform.

The question arises whether in those circumstances the defendants are liable, and that depends to some degree, though in this case not entirely, on the legal question whether Mr. Stowell in visiting these premises visited them as a licensee or an invitee.

The question of what is an invitee and what is a licensee has been considered many times and I suppose the best definition is that an invitee is a person "invited to the "premises by the owner or occupier for the purposes of "business or of manifest interest"; that is to say, he is a person who receives permission from the occupier as a matter of business and not as a matter of grace. The words quoted are taken from the speech of Lord Buckmaster in *Fairman* v. *Perpetual Investment Building Society* (1).

The question here is, in the circumstances of this case, did Mr. Stowell enter for the purposes of the occupier—did he receive permission from the occupier as a matter of business and not as a matter of grace? First of all one has to be satisfied that he received his invitation or was given permission to be on the premises, but no direct evidence has been led to that. I have been requested to exercise the general knowledge which I suppose I have, not as a judge but at least as a jury, as to what happens at large railway termini, particularly at Paddington. It is quite clear that the Railway Executive do permit persons to go into their stations both for the purpose of seeing people off and welcoming people on arrival. In fact they apparently go further in most of the large railway stations, and particularly at Paddington, because there they go to the trouble of putting up an indicator announcing the arrival of trains so as to indicate to people on the premises to which particular platform they should go to meet any particular train coming in. As far as departure platforms are concerned, they allow people to go there, but they do make them take a platform ticket for the privilege of doing so, which turns them into something of the nature of persons making a contract with the Railway Executive. I am quite satisfied that the Railway Executive do invite anybody who desires to do so to go and meet persons coming off trains, particularly to help them with their luggage. That might create a position of occupier and licensee; but in my view the Railway Executive had an interest in the plaintiff's going upon their premises. It was first of all a convenience to their passengers. It was also an assistance to the Railway Executive because the plaintiff would carry the luggage and help to clear the platform earlier. That was a sufficient interest between Mr. Stowell and the Railway Executive to make him an invitee for that purpose. I am confirmed in that view by the judgment of Denman J., in the case of *Watkins* v. *Great Western Ry. Co.* (1). That was a case where a mother was accompanying her daughter to the train. She had taken a ticket for her daughter; she was not going to travel herself but was going to see her daughter off, and whilst going across a footbridge for that purpose she walked into a plank on which a porter was standing and sustained somewhat serious injuries. It was a Divisional Court which heard the case and the court did not quite agree as to facts, nor as to the result, but in stating the law in that case Denman J. said: "The question then arises whether the plaintiff in the "present case was in the same position as the plaintiff in the "case of *Bolch* v. *Smith* (2) as a mere licensee, or whether "any other such relation existed as to deprive the defendants "of the right to rely on the doctrine there relied upon. I am "of opinion that a railway company, keeping open a bridge "over their line for the use of their passengers is bound to "keep that bridge reasonably safe, and that if in practice "the friends of passengers are allowed by the company's "servants to see passengers off by the trains, and to cross "the bridge without asking special permission, the duty "of the company in that respect cannot be put down towards "them otherwise than it is towards those whom they "accompany for such not unreasonable purpose. I think "that this view is consistent with the cases of *Corby* v. *Hill* (3) "and *Smith* v. *London & St. Katharine Docks Co.* (4). I "regard the passenger's friend so permitted to go along "the bridge by constant acquiescence on the part of the "railway company as not being in the nature of a person "barely licensed to be there, but as being invited to go to "the same extent as the passenger whom he accompanies, "and is there on lawful business in which the passenger "and the company have both an interest." It seems to me that on the reasoning of that statement applied to the facts of this case, where a father of a girl who is travelling goes to meet her for the purpose of collecting her luggage and helping her out of the station, he is there on exactly the same terms as she who has got a ticket to travel also is. He is there as an invitee. The railway company has a common interest with him and with his being there, and in those circumstances the railway company owe to him the duty of an invitor to an invitee. That duty has been so often stated that I do not think I need repeat it again here. It is stated by Willes J. in *Indermaur* v. *Dames* (1). The duty is to prevent damage from unusual danger to an invitee (the invitee taking reasonable care for his own safety) of which the occupier knew or ought to have known.

---

(1) [1923] A. C. 74, 80.

---

(1) 37 L. T. 193.
(2) (1862) 7 H. & N. 736.
(3) (1858) 4 C. B. (N. S.) 556.
(4) (1868) L. R. 3 C. P. 326.

This, of course, raises the question of what is unusual danger. Is it danger unusual generally, or is it danger unusual in premises of the type, description and use, to which the invitation is extended, or is it a danger unusual from the point of view of the particular invitee, regard being had to the type, description and use of the premises to which he has been invited? In my view "unusual danger" means a danger unusual from the point of view of the particular invitee.

It is said on behalf of the defendants by counsel that this could not be an unusual danger because it was an obvious danger. If the thing is obvious it is not unusual to the person who has seen it, but it may be unusual to a person who has not seen it even although he could see it if he is acting reasonably and taking reasonable care for his own protection. What is acting reasonably must depend on the circumstances of each particular case. If one is walking along a dockside where one expects mooring ropes to be out and other obstructions about the dock or quayside, then one would have to walk gingerly and watch every step more or less, but if one is walking down a railway platform, provided for the purpose of those who use the trains, one is entitled to expect that that platform will be free from any obstruction. It would not be reasonable to require that those using the platforms should be looking down at their feet at every step they take. From one's own experience, when a train comes in, if one was expected to look at one's feet one would not get a seat in some of the over-full compartments. People must be expected to be looking about—looking at and meeting passengers coming off the train; anyone who has been caught in the rush of an over-full train arriving at Paddington shortly after any holiday can realize the difficulties of trying to watch every yard of the way when going along against the stream.

---

(1) L. R. 1 C. P. 274.

In my view, this patch on number 9 platform was an unusual danger and the plaintiff was acting reasonably in the look-out he was keeping. In those circumstances it was an unusual danger to him, and in my view, therefore, the Railway Executive were in breach of the duty they owed to him. He is not guilty of contributory negligence and, therefore, he is entitled to damages for the injury he has sustained as a result of their breach of duty.

[His Lordship then reviewed the evidence on the question of damages, which he assessed at 523*l.* 15*s.* 0*d.*]

Judgment for the plaintiff.

Solicitors for the plaintiff: *Tatton, Gaskell & Tatton.*
Solicitor for the defendants: *M. H. B. Gilmour.*

1949
May 6;
June 2.

Ormerod J.

MINISTER OF PENSIONS *v.* HORSEY.

Pension—Members of tribunal not in agreement—Claim allowed by majority—Decision not effective—Binding effect of decision of judge in pensions appeal—Pensions Appeal Tribunals Act, 1943 (6 & 7 *Geo.* 6, *c.* 39).

A pensions appeal tribunal can only allow a claim under the Pensions Appeal Tribunals Act, 1943, if its members are unanimous. *Brain* v. *Minister of Pensions* [1947] K. B. 625, followed.

Appeal by Minister of Pensions from pensions appeal tribunal.

The respondent suffered injuries while serving as a regular officer in the Royal Navy, and claimed a pension in respect thereof on the ground that they were attributable to war service. The Minister rejected the claim, and the respondent appealed to a pensions appeal tribunal. The chairman was of opinion that the injuries were not, but the two other members were of opinion that they were, attributable to war service. The tribunal accordingly allowed the appeal.

The Minister appealed on the ground (inter alia) that a majority decision of a pensions appeal tribunal was of no effect.

H. L. Parker for the Minister of Pensions. It necessarily follows from the decision of Denning J. in *Brain* v. *Minister of Pensions* (1), in which he decided that a claim to a pension was not to be rejected by a pensions appeal tribunal unless its members were unanimous in rejecting it, that such a claim cannot be allowed unless the members of the tribunal are unanimous in allowing it. Either Parliament, in passing the Pensions Appeal Tribunals Act, 1943, has said that decisions of a pensions appeal tribunal may be by a majority, or it has said that the decisions must be unanimous. Denning J. decided that Parliament has said that their decisions must be unanimous. One cannot distinguish decisions for and against the claimant in this respect.

T. J. Kelly for the respondent. Denning J. only meant in *Brain* v. *Minister of Pensions* (1) that if only two out of the three members of a pensions appeal tribunal found in favour of the Minister he had failed to satisfy the onus, which was upon him, of proving beyond reasonable doubt that the claimant's disability was not attributable to war service.

[ORMEROD J. That argument would apply to a jury in a criminal case; but in such a case they must come to a unanimous verdict one way or the other.]

But Denning J. expressly gave (2) as the ground of his decision in *Brain* v. *Minister of Pensions* (1) that it was the duty of the tribunal to give the claimant the benefit of any reasonable doubt. On that reasoning where a tribunal by a majority allow a claim the finding of the majority should stand. A judge hearing a pensions appeal is bound by a previous decision of another judge in a previous pensions appeal, on the same ground as that on which the Divisional Court is bound by its own previous decisions: *Police Authority for Huddersfield* v. *Watson* (3).

Parker replied.

Cur. adv. vult.

June 2. ORMEROD J. It has already been decided by Denning J. in *Brain* v. *Minister of Pensions* (1) that a claim to a pension is not to be rejected by a pensions appeal tribunal

---

(1) [1947] K. B. 625.
(2) Ibid. 627.
(3) [1947] K. B. 842.

1949

MINISTER OF PENSIONS *v.* HORSEY.

Ormerod J.

unless the tribunal is unanimous in rejecting it. It was argued on behalf of the respondent that this rule should not apply to a case where the tribunal was not unanimous in allowing a claim as the onus of proof is on the Minister, and that if the Minister had satisfied only a minority of the members of the tribunal that a claim should be rejected, it must be allowed. I cannot accept that argument. A majority verdict in a criminal trial cannot be accepted whether the majority is in favour of conviction or acquittal, and it matters not for that purpose that the burden of proof is on the prosecution. Accepting as I do, and, indeed, as I think I must, the decision of Denning J. that a claim to a pension cannot be rejected by a majority, I am satisfied, too, that a claim should not be allowed except by the unanimous decision of the members of the tribunal. Denning J. pointed out in *Brain* v. *Minister of Pensions* (1) the serious risk of error in a decision of a majority. That risk is, of course, equally great whether the decision be in favour of one party or the other. There is no express statutory provision that the decision of the majority shall be effective, and in those circumstances I have come to the conclusion that a claim cannot be allowed except by a unanimous decision of the tribunal.

Under these circumstances it follows, of course, that the appeal must be allowed and that the case must be sent back to be dealt with by another tribunal.

Appeal allowed.

Solicitor for Minister: *Treasury Solicitor.*
Solicitors for respondent: *Fowler, Legg & Co.*

(1) [1947] K. B. 625.

R. P. C.

ON APPEAL

Considered. MASON *v.* BURNINGHAM. [1949] 2 K. B. 545

C. A.

1949

Mar. 21, 22, 23; *Apr.* 12.

Tucker, Asquith and Singleton L.JJ.

VICTORIA LAUNDRY (WINDSOR) LD. *v.* NEWMAN INDUSTRIES LD.; COULSON & CO. LD. (THIRD PARTIES).

Sale of goods—Purchase of boiler by laundry company—Part of profit-making plant—Delay in delivery—Measure of damages—Loss of business profits.

The plaintiffs, launderers and dyers, wishing to extend their business, and having in view (inter alia) the prospect of certain profitable dyeing contracts, required a larger boiler. They therefore on April 26, 1946 concluded a contract with the defendants, an

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

engineering firm, to purchase a boiler, then installed on the defendants' premises, for 2,150*l*., and delivery was arranged to be taken on June 5. Owing to a mishap while the boiler was being dismantled by the third parties, under contract with the defendants, it rolled over and sustained damage, and delivery to the plaintiffs was delayed until November 8, 1946. The defendants were aware of the nature of the plaintiffs' business, and by letter had been informed that the plaintiffs intended to put the boiler in use in the shortest possible space of time. In an action for breach of contract the plaintiffs claimed to include in their damages their loss of business profits. The trial judge allowed the plaintiffs a sum for damages under certain minor heads but disallowed the claim for loss of profits on the ground that it was based on special circumstances which had not been drawn to the attention of the defendants, and therefore came within the second rule in *Hadley* v. *Baxendale* (1854) 9 Exch. 341. On appeal :—

Held, that the defendants, an engineering company, with knowledge of the nature of the plaintiffs' business, having promised delivery by a particular date of a large and expensive plant, could not reasonably contend that they could not foresee that loss of business profit would be liable to result to the purchaser from a long delay in delivery ; that although the defendants had no knowledge of the dyeing contracts which the plaintiffs had in prospect, it did not follow that the plaintiffs were precluded from recovering some general, and perhaps conjectural, sum for loss of business in respect of contracts reasonably to be expected ; and therefore the appeal must be allowed and the damages referred to an Official Referee for assessment in consonance with those findings of the court.

Decision of Streatfeild J. [1948] W. N. 397, reversed.

Accuracy of the headnote in *Hadley* v. *Baxendale* questioned.

APPEAL from Streatfeild J.

The plaintiffs, a limited company, carrying on a business as launderers and dyers at Windsor, were in January, 1946, minded to expand their business, and to that end required a boiler of much greater capacity than the one they then possessed, which was of a capacity of 1,500-1,600 lbs. evaporation per hour. Seeing an advertisement by the defendants on January 17, 1946, of two " vertical Cochran boilers of " 8,000 lb. per hour capacity heavy steaming," the plaintiffs negotiated for the purchase of one of them, and by April 26 had concluded a contract for its purchase at a price of 2,150*l*., loaded free on transport at Harpenden, where it was installed in the premises of the defendants. The defendants knew that the plaintiffs were launderers and dyers, and wanted the boiler for use in their business. Also, during the negotiations

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. *v.* NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

the plaintiffs by letter expressed their intention to "put it "into use in the shortest possible space of time." Arrangements were made by the plaintiffs with the defendants to take delivery at Harpenden on June 5, and the plaintiffs on that date sent a lorry to Harpenden to take delivery, but it was then ascertained that four days earlier the third parties, who had been employed by the defendants to dismantle the boiler, had allowed it to fall on its side and sustain damage. The plaintiffs refused to take delivery unless the damage was made good and ultimately the defendants agreed to arrange for the necessary repairs. The plaintiffs did not receive delivery of the boiler until November 8, 1946, and in the present action they claimed damages for breach of contract and sought to include in the damages loss of business profits during the period from June 5 to November 8, 1946.

Streatfeild J. gave judgment for the plaintiffs against the defendants for 110*l.* damages under certain minor heads, but held that they were not entitled to include in their measure of damages loss of business profits during the period of delay. The boiler, he said, was not a whole plant capable of being used by itself as a profit-making machine. Only the entire plant, including the vats, was a profit-making machine. The defendants were supplying the plaintiffs with only a part, the function of which they did not know, of that plant. The case fell, in his opinion, within the second rule in *Hadley* v. *Baxendale* (1) and the defendants were not liable for the loss of profits because the special object for which the plaintiffs were acquiring the boiler had not been drawn to the defendants' attention.

The plaintiffs appealed.

Beney K.C. and John Davidson for plaintiffs: The learned judge it is submitted came to a wrong decision. The speeches of their Lordships in *A/B. Karlshamns Oljefabriker* v. *Monarch Steamship Co. Ld* (2) contain the latest pronouncement on the meaning of the rules in *Hadley* v. *Baxendale* (1). Lord Wright said: "The ruling of Baron Alderson has consistently been "followed, and the only difficulty, as Lord Sankey observed in "*Banco de Portugal* v. *Waterlow & Sons* (3), has been in applying it. The distinction there drawn is between damages "arising naturally (which means in the normal course of things)

(1) (1854) 9 Exch. 341.

(2) [1948] A. C. 196.

(3) [1932] A. C. 452.

" and cases where there are special and extraordinary circum-" stances beyond the reasonable prevision of the parties. The " distinction between these types is usually described in " English law as that between general and special damages; " the latter are such that if they are not communicated it " would not be fair or reasonable to hold the defendant respon-" sible for losses which he could not be taken to contemplate " as likely to result from the breach of contract." He continued: " It appears that if the respondents had been claiming " special and peculiar loss due to interference with their " business such damages might, prima facie, be too remote " and not proper to be recovered in the absence of notice when " the contract was entered into . . . . But the respondents " are claiming only for their loss directly due to the failure " of the appellants to fulfil their promise to deliver the beans " at Karlshamn. Their claim is not based on any extra-" ordinary or peculiar matter, but is only what might be " claimed by any party which suffers injury in the general " circumstances of that business and at that time and place." If the defendants in this case had considered in April, 1946, the probable effects of a delay of five months, with due regard to what might reasonably be expected to occur, they could not have failed to foresee that some financial loss to the plaintiffs was a serious possibility. That, however, is not the test which the learned judge below appears to have applied. The defendants describe themselves as electrical engineers and manufacturers, and from the fact that they were asked if they would do the erection and fitting of the boiler they must have known that the boiler was to be put into operation and was not being purchased merely as a spare. Also the fact that by letter the plaintiffs had intimated their intention to put the boiler into use as speedily as possible justified the inference being drawn that speed was necessary. It must have been reasonably conveyed to the defendants that the boiler was wanted for use promptly. Although the facts in *Cory* v. *Thames Ironworks Co.* (1) were different from those in the present case, the test laid down to see into what category the case fell is of assistance in this case. The dividing line is not between a whole profit-earning plant and a part. It is a matter of degree. The test is what a reasonable hypothetical man would contemplate was the profitable use to which the article was to be put. It does not depend on actual know-

(1) (1868) L. R. 3 Q. B. 181.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

ledge, but on what a reasonable person would contemplate. The appeal should be allowed and the matter referred to an official referee for the assessment of damages.

Paull K.C. and A. J. Hodgson for defendants. The measure of damages recoverable in any case of breach of contract must depend upon the inferences which the court is entitled to draw from the facts. The defendants here were selling a second-hand boiler. They had no special knowledge of the use of boilers generally and no knowledge of how laundries were run. There may be a great difference between a sale such as this and the sale of a chattel by manufacturers of and experts in the use of a particular chattel. The seller having no special knowledge or information that this part of machinery was essential for immediate profit-making, he is not liable for that loss of profit: *Hadley* v. *Baxendale* (1). To saddle the defendant with liability where the loss of profit is due to special circumstances the court must be able to draw the inference that those circumstances have been brought to the notice of the defendant. The authorities draw a distinction between the supply of part of a profit-making machine and the supply of the machine itself: see *Portman* v. *Middleton* (2). The fact that what is being supplied is only part of a plant negatives the idea that it is wanted for immediate use. *Gee* v. *Lancashire and Yorkshire Railway* (3) and *British Columbia Sawmills* v. *Nettleship* (4) are decisions strongly in favour of the present defendants. In the latter case it was expressly held that it was not sufficient that the defendant knew the thing supplied was going to be used in the plaintiffs' business. It must be found that the defendant had that knowledge at the time he entered into the contract and expressly or impliedly accepted liability for a breach. Special circumstances must have been brought to the knowledge of the other contracting party or else the claim comes under the second rule in *Hadley* v. *Baxendale* (1). The defendants did not know that the boiler they were supplying was a bigger boiler than the one already possessed by the plaintiffs and therefore they must not be assumed to know that delay in delivery would cause loss of profits. They did not know that everything was ready for putting the boiler in place. So far as they knew it might be required as a spare. Mere knowledge that the boiler was to be used in the plaintiffs' business is not sufficient to fix the defendants with liability.

---

(1) 9 Exch. 341.

(2) (1858) 4 C. B. (N. S.) 322.

(3) (1860) 6 H. & N. 211.

(4) (1868) L. R. 3 C. P. 499.

Caplan for third parties.

Cur. adv. vult.

April 12. Asquith L.J. delivered the judgment of the court: This is an appeal by the plaintiffs against a judgment of Streatfeild J. in so far as that judgment limited the damages to 110*l.* in respect of an alleged breach of contract by the defendants, which is now uncontested. The breach of contract consisted in the delivery of a boiler sold by the defendants to the plaintiffs some twenty odd weeks after the time fixed by the contract for delivery. The short point is whether, in addition to the 110*l.* awarded, the plaintiffs were entitled to claim in respect of loss of profits which they say they would have made if the boiler had been delivered punctually. Seeing that the issue is as to the measure of recoverable damage and the application of the rules in *Hadley* v. *Baxendale* (1), it is important to inquire what information the defendants possessed at the time when the contract was made, as to such matters as the time at which, and the purpose for which, the plaintiffs required the boiler. The defendants knew before, and at the time of the contract, that the plaintiffs were laundrymen and dyers, and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use. On the latter point the correspondence is important. The contract was concluded by, and is contained in, a series of letters. In the earliest phases of the correspondence—that is, in letters of January 31 and February 1, 1946—(which letters, as appears from their terms, followed a telephone call on the earlier date)—the defendants undertook to make the earliest possible arrangements for the dismantling and removal of the boiler. The natural inference from this is that in the telephone conversation referred to the plaintiffs had conveyed to the defendants that they required the boiler urgently. Again, on February 7 the plaintiffs write to the defendants: "We should appreciate your letting us know "how quickly your people can dismantle it"; and finally, on April 26, in the concluding letter of the series by which the contract was made: "We are most anxious that this" (that is, the boiler) "should be put into use in the shortest possible "space of time." Hence, up to and at the very moment when a concluded contract emerged, the plaintiffs were pressing upon the defendants the need for expedition; and the last letter was a plain intimation that the boiler was wanted for immediate use. This is none the less so because when, later, the plaintiffs encountered delays in getting the necessary permits and licences, the exhortations to speed come from the other side, who wanted their money, which in fact they were paid in advance of delivery. The defendants knew the plaintiffs needed the boiler as soon as the delays should be overcome, and they knew by the beginning of June that such delays had by then in fact been overcome. The defendants did not know at the material time the precise role for which the boiler was cast in the plaintiffs' economy, *e.g.* whether (as the fact was) it was to function in substitution for an existing boiler of inferior capacity, or in replacement of an existing boiler of equal capacity, or as an extra unit to be operated side by side with and in addition to any existing boiler. It has indeed been argued strenuously that, for all they knew, it might have been wanted as a " spare " or " stand-" by," provided in advance to replace an existing boiler when, perhaps some time hence, the latter should wear out; but such an intention to reserve it for future use seems quite inconsistent with the intention expressed in the letter of April 26, to " put it into use in the shortest possible space " of time."

---

(1) 9 Exch. 341.

In this connexion, certain admissions made in the course of the hearing are of vital importance. The defendants formally admitted what in their defence they had originally traversed, namely, the facts alleged in para. 2 of the statement of claim. That paragraph reads as follows: " At the date " of the contract hereinafter mentioned the defendants well " knew as the fact was that the plaintiffs were launderers and " dyers carrying on business at Windsor and required the " said boiler for use in their said business and the said contract " was made upon the basis that the said boiler was required " for the said purpose."

On June 5 the plaintiffs, having heard that the boiler was ready, sent a lorry to Harpenden to take delivery. Mr. Lennard, a director of the plaintiff company, preceded the lorry in a car. He discovered on arrival that four days earlier the contractors employed by the defendants to dismantle the boiler had allowed it to fall on its side, sustaining injuries. Mr. Lennard declined to take delivery of the damaged boiler in its existing condition and insisted that the damage must be made good. He was, we think, justified in this attitude, since no similar article could be bought in the market. After a long wrangle, the defendants agreed to perform the necessary repairs and, after further delay through the difficulty of finding a contractor who was free and able to perform them, completed the repairs by October 28. Delivery was taken by the plaintiffs on November 8 and the boiler was erected and working by early December. The plaintiffs claim, as part—the disputed part—of the damages, loss of the profits they would have earned if the machine had been delivered in early June instead of November. Evidence was led for the plaintiffs with the object of establishing that if the boiler had been punctually delivered, then, during the twenty odd weeks between then and the time of actual delivery, (1.) they could have taken on a very large number of new customers in the course of their laundry business, the demand for laundry services at that time being insatiable—they did in fact take on extra staff in the expectation of its delivery—and (2.) that they could and would have accepted a number of highly lucrative dyeing contracts for the Ministry of Supply. In the statement of claim, para. 10, the loss of profits under the first of these heads was quantified at 16*l.* a week and under the second at 262*l.* a week.

The evidence, however, which promised to be voluminous, had not gone very far when Mr. Paull, for the defendants, submitted that in law no loss of profits was recoverable at all, and that to continue to hear evidence as to its quantum was merely waste of time. He suggested that the question of remoteness of damage under this head should be decided on the existing materials, including the admissions to which we have referred. The learned judge accepted Mr. Paull's submission, and on that basis awarded 110*l.* damages under certain minor heads, but nothing in respect of loss of profits, which he held to be too remote. It is from that decision that the plaintiffs now appeal. It was a necessary consequence of the course which the case took that no evidence was given on behalf of the defendants, and only part of the evidence available to the plaintiffs. It should be observed parenthetically that the defendants had added as third parties the contractors who, by dropping the boiler, and causing the injuries to it, prevented its delivery in early June and caused the defendants to break their contract. Those third-party proceedings have been adjourned pending the hearing of the present appeal as between the plaintiffs and the defendants. The third parties, nevertheless, were served with notice of appeal by the defendants and argument was heard for them at the hearing of the appeal.

The ground of the learned judge's decision, which we consider more fully later, may be summarized as follows: He took the view that the loss of profit claimed was due to special circumstances and therefore recoverable, if at all, only under the second rule in *Hadley* v. *Baxendale* and not recoverable in this case because such special circumstances were not at the time of the contract communicated to the defendants. He also attached much significance to the fact that the object supplied was not a self-sufficient profit-making article, but part of a larger profit-making whole, and cited in this connexion the cases of *Portman* v. *Middleton* (1) and *British Columbia Sawmills* v. *Nettleship* (2). Before commenting on the learned judge's reasoning, we must refer to some of the authorities.

The authorities on recovery of loss of profits as a head of damage are not easy to reconcile. At one end of the scale stand cases where there has been non-delivery or delayed delivery of what is on the face of it obviously a profit-earning chattel; for instance, a merchant or passenger ship: see *Fletcher* v. *Tayleur* (3), *In re Trent and Humber Company, ex parte Cambrian Steam Packet Company* (4); or some essential part of such a ship; for instance, a propeller, in *Wilson* v. *General Ironscrew Company* (5), or engines, *Saint Line* v. *Richardson* (6). In such cases loss of profit has rarely been refused. A second and intermediate class of case in which loss of profit has often been awarded is where ordinary mercantile goods have been sold to a merchant with knowledge by the vendor that the purchaser wanted them for resale; at all events, where there was no market in which the purchaser could buy similar goods against the contract on the seller's default, see, for instance, *Borries* v. *Hutchinson* (7). At the other end of the scale are cases where the defendant is not a vendor of the goods, but a carrier, see, for instance, *Hadley* v. *Baxendale* (8) and *Gee* v. *Lancashire and Yorkshire Railway* (9). In such cases the courts have been slow to allow loss of

(1) 4 C. B. (N. S.) 322.

(2) L. R. 3 C. P. 499.

(3) (1855) 17 C. B. 21.

(4) (1868) L. R. 6 Eq. 396.

(5) (1878) 47 L. J. (Q. B.) 23.

(6) [1940] 2 K. B. 99.

(7) (1865) 18 C. B. (N. S.) 445.

(8) 9 Exch. 341.

(9) 6 H. & N. 211.

profit as an item of damage. This was not, it would seem, because a different principle applies in such cases, but because the application of the same principle leads to different results. A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other "special circumstances" which may cause exceptional loss if due delivery is withheld.

Three of the authorities call for more detailed examination. First comes *Hadley* v. *Baxendale* (1) itself. Familiar though it is, we should first recall the memorable sentence in which the main principles laid down in this case are enshrined: "Where two parties have made a contract which one of them "has broken, the damages which the other party ought to "receive in respect of such breach of contract should be such "as may fairly and reasonably be considered as either arising "naturally, *i.e.* according to the usual course of things, from "such breach of contract itself, or such as may reasonably "be supposed to have been in the contemplation of both "parties, at the time they made the contract, as the probable "result of the breach of it." The limb of this sentence prefaced by "either" embodies the so-called "first" rule; that prefaced by "or" the "second." In considering the meaning and application of these rules, it is essential to bear clearly in mind the facts on which *Hadley* v. *Baxendale* (1) proceeded. The head-note is definitely misleading in so far as it says that the defendant's clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. The same allegation figures in the statement of facts which are said on page 344 to have "appeared" at the trial before Crompton J. If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round; must, that is, have held the damage claimed was recoverable under the second rule. But it is reasonably plain from Alderson B's judgment that the court rejected this evidence, for on page 355 he says: "We find that the only "circumstances here communicated by the plaintiffs to the "defendants at the time when the contract was made were "that the article to be carried was the broken shaft of a mill "and that the plaintiffs were the millers of that mill," and it is on this basis of fact that he proceeds to ask, "How do these "circumstances show reasonably that the profits of the mill

---

(1) 9 Exch. 341.

" must be stopped by an unreasonable delay in the delivery " of the broken shaft by the carrier to the third person ? "

British Columbia Sawmills v. *Nettleship* (1) annexes to the principle laid down in *Hadley* v. *Baxendale* (2) a rider to the effect that where knowledge of special circumstances is relied on as enhancing the damage recoverable that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances. The knowledge which was lacking in that case on the part of the defendant was knowledge that the particular box of machinery negligently lost by the defendants was one without which the rest of the machinery could not be put together and would therefore be useless.

Cory v. *Thames Ironworks Company* (3)—a case strongly relied on by the plaintiffs—presented the peculiarity that the parties contemplated respectively different profit-making uses of the chattel sold by the defendant to the plaintiff. It was the hull of a boom derrick, and was delivered late. The plaintiffs were coal merchants, and the obvious use, and that to which the defendants believed it was to be put, was that of a coal store. The plaintiffs, on the other hand, the buyers, in fact intended to use it for transhipping coals from colliers to barges, a quite unprecedented use for a chattel of this kind, one quite unsuspected by the sellers and one calculated to yield much higher profits. The case accordingly decides, inter alia, what is the measure of damage recoverable when the parties are not ad idem in their contemplation of the use for which the article is needed. It was decided that in such a case no loss was recoverable beyond what would have resulted if the intended use had been that reasonably within the contemplation of the defendants, which in that case was the " obvious " use. This special complicating factor, the divergence between the knowledge and contemplation of the parties respectively, has somewhat obscured the general importance of the decision, which is in effect that the facts of the case brought it within the first rule of *Hadley* v. *Baxendale* (2) and enabled the plaintiff to recover loss of such profits as would have arisen from the normal and obvious use of the article. The " natural consequence," said Blackburn J., of not delivering the derrick was that 420*l*. representing those

---

(1) L. R. 3 C. P. 409.

(2) 9 Exch. 341.

(3) L. R. 3 Q. B. 181, 187.

C. A.

1949

Victoria Laundry (Windsor) Ld. v. Newman Industries Ld. Coulson & Co. Ld. (Third Parties).

normal profits was lost. Cockburn C.J., interposing during the argument, made the significant observation: "No doubt "in order to recover damage arising from a special purpose "the buyer must have communicated the special purpose to "the seller; but there is one thing which must always be in "the knowledge of both parties, which is that the thing is "bought for the purpose of being in some way or other profitably applied." This observation is apposite to the present case. These three cases have on many occasions been approved by the House of Lords without any material qualification.

What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following:—

(1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim* v. *Chicoutimi Pulp Company* (1)). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley* v. *Baxendale* (2). But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

(1) [1911] A. C. 301.

(2) 9 Exch. 341.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. *v.* NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

(5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *A/B Karlshamns Oljefabriker* v. *Monarch Steamship Company Limited* (1).)

(6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a " serious possibility " or a " real danger." For short, we have used the word " liable " to result. Possibly the colloquialism " on the cards " indicates the shade of meaning with some approach to accuracy.

If these, indeed, are the principles applicable, what is the effect of their application to the facts of this case ? We have, at the beginning of this judgment, summarized the main relevant facts. The defendants were an engineering company supplying a boiler to a laundry. We reject the submission for the defendants that an engineering company knows no more than the plain man about boilers or the purposes to which they are commonly put by different classes of purchasers, including laundries. The defendant company were not, it is true, manufacturers of this boiler or dealers in boilers, but they gave a highly technical and comprehensive description of this boiler to the plaintiffs by letter of January 19, 1946, and offered both to dismantle the boiler at Harpenden and to re-erect it on the plaintiffs' premises. Of the uses or purposes to which boilers are put, they would clearly know more than the uninstructed layman. Again, they knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose ; for instance, to work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which term we, for the purposes of the rest of this judgment, include maintenance or increase of profit, or reduction of loss? (We shall speak henceforward not of loss of profit, but of "loss of business.") No commercial concern commonly purchases for the purposes of its business a very large and expensive structure like this—a boiler 19 feet high and costing over 2,000*l.*—with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date, with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business (in the sense indicated above) would be liable to result to the purchaser from a long delay in the delivery thereof. The suggestion that, for all the supplier knew, the boiler might have been needed simply as a "stand-" by," to be used in a possibly distant future, is gratuitous and was plainly negatived by the terms of the letter of April 26, 1946.

---

(1) [1949] A. C. 196.

Since we are differing from a carefully reasoned judgment, we think it due to the learned judge to indicate the grounds of our dissent. In that judgment, after stressing the fact that the defendants were not manufacturers of this boiler or of any boilers (a fact which is indisputable), nor (what is disputable) people possessing any special knowledge not common to the general public of boilers or laundries as possible users thereof, he goes on to say: "That is the general principle and I think " that the principle running through the cases is this—and to " this extent I agree with Mr. Beney—that if there is nothing " unusual, if it is a normal user of the plant, then it may well " be that the parties must be taken to contemplate that the " loss of profits may result from non-delivery, or the delay " in delivery, of the particular article. On the other hand, " if there are, as I think there are here, special circumstances, " I do not think that the defendants are liable for loss of " profits unless these special circumstances were drawn to their " notice. In looking at the cases, I think there is a distinction " as Mr. Paull has pointed out and insists upon, between the "supply of the part of the profit-making machine, as against "the profit-making machine itself." Then, after referring to *Portman* v. *Middleton* (1), he continues: "It is to be observed "that not only must the circumstances be known to the "supplier, but they must be such that the object must be "taken to have been within the contemplation of both parties. "I do not think that on the facts of the case as I have heard "them, and upon the admissions, it can be said that it was "within the contemplation of the supplier, namely, the "defendants, that any delay in the delivery of this boiler was "going to lead necessarily to loss of profits. There was nothing "that I know of in the evidence to indicate how it was to be "used or whether delivery of it by a particular day would "necessarily be vital to the earning of these profits. I agree "with the propositions of Mr. Paull that it was no part of the "contract, and it cannot be taken to have been the basis of "the contract, that the laundry would be unable to work if "there was a delay in the delivery of the boiler, or that the "laundry was extending its business, or that it had any special "contracts which they could fulfil only by getting delivery "of this boiler. In my view, therefore, this case falls within "the second rule of *Hadley* v. *Baxendale* (2) under which they "are not liable for the payment of damages for loss of profits "unless there is evidence before the court—which there is not "—that the special object of this boiler was drawn to their "attention and that they contracted upon the basis that delay "in the delivery of the boiler would make them liable to "payment of loss of profits."

The answer to this reasoning has largely been anticipated in what has been said above, but we would wish to add: First, that the learned judge appears to infer that because certain "special circumstances" were, in his view, not "drawn to "the notice of" the defendants and therefore, in his view, the operation of the "second rule" was excluded, ergo nothing in respect of loss of business can be recovered under the "first "rule." This inference is, in our view, no more justified in the present case than it was in the case of *Cory* v. *Thames Ironworks Company* (3). Secondly, that while it is not wholly clear what were the "special circumstances" on the non-communication of which the learned judge relied, it would seem that they were, or included, the following:—(*a*) the

(1) 4 C. B. (N. S.) 322.

(2) 9 Exch. 341.

(3) L. R. 3 Q. B. 181.

"circumstance" that delay in delivering the boiler was going to lead "necessarily" to loss of profits. But the true criterion is surely not what was bound "necessarily" to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to "loss of business"; (*b*) the "circumstance" that the plaintiffs needed the boiler "to extend their business." It was surely not necessary for the defendants to be specifically informed of this, as a precondition of being liable for loss of business. Reasonable persons in the shoes of the defendants must be taken to foresee without any express intimation, that a laundry which, at a time when there was a famine of laundry facilities, was paying 2,000*l.* odd for plant and intended at such a time to put such plant "into use" immediately, would be likely to suffer in pocket from five months' delay in delivery of the plant in question, whether they intended by means of it to extend their business, or merely to maintain it, or to reduce a loss; (*c*) the "circumstance" that the plaintiffs had the assured expectation of special contracts, which they could only fulfil by securing punctual delivery of the boiler. Here, no doubt, the learned judge had in mind the particularly lucrative dyeing contracts to which the plaintiffs looked forward and which they mention in para. 10 of the statement of claim. We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected.

Thirdly, the other point on which Streatfeild J. largely based his judgment was that there is a critical difference between the measure of damages applicable when the defendant defaults in supplying a self-contained profit-earning whole and when he defaults in supplying a part of that whole. In our view, there is no intrinsic magic, in this connexion, in the whole as against a part. The fact that a part only is involved is only significant in so far as it bears on the capacity of the supplier to foresee the consequences of non-delivery. If it is clear from the nature of the part (or the supplier of it is informed) that its non-delivery will have the same effect as non-delivery of the whole, his liability will be the same as if he had defaulted in delivering the whole. The cases of *Hadley* v. *Baxendale* (1), *British Columbia Sawmills* v. *Nettleship* (2) and *Portman* v. *Middleton* (3), which were so strongly relied on for the defence and by the learned judge, were all cases in which, through want of a part, catastrophic results ensued, in that a whole concern was paralysed or sterilized; a mill stopped, a complex of machinery unable to be assembled, a threshing machine unable to be delivered in time for the harvest and therefore useless. In all three cases the defendants were absolved from liability to compensate the plaintiffs for the resulting loss of business, not because what they had failed to deliver was a part, but because there had been nothing to convey to them that want of that part would stultify the whole business of the person for whose benefit the part was contracted for. There is no resemblance between these cases and the present, in which, while there was no question of a total stoppage resulting from non-delivery, yet there was ample means of knowledge on the part of the defendants that business loss of some sort would be likely to result to the plaintiffs from the defendants' default in performing their contract.

We are therefore of opinion that the appeal should be allowed and the issue referred to an official referee as to what damage, if any, is recoverable in addition to the 110*l.* awarded by the learned trial judge. The official referee would assess those damages in consonance with the findings in this judgment as to what the defendants knew or must be taken to have known at the material time, either party to be at liberty to call evidence as to the quantum of the damage in dispute.

Appeal allowed.

Solicitors for plaintiffs: *Kenneth Brown, Baker, Baker.*

Solicitors for defendants: *Braikenridge & Edwards for Veale & Co., Bristol.*

Solicitors for third parties: *Bosman, Robinson & Co.*

---

(1) 9 Exch. 341.

(2) L. R. 3 C. P. 499.

(3) 4 C. B. (N. S.) 322.

A. W. G.

C. A.

1949
May 25,
26, 27.

Lord Greene
M.R.,
Evershed and
Singleton L.JJ.

MASON *v.* BURNINGHAM.

County court—Practice—Claim for more than 20*l.—Reduction below* 20*l. by payment—Payment made before service of particulars of claim—Action dismissed—Appeal without leave of court—Preliminary objection—County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105.

Sale of goods—Implied condition of seller's right to sell—Warranty for quiet possession—Sale of stolen typewriter—Buyer spends money on overhaul—Typewriter returned to true owner—Liability of seller—Measure of damages—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 12, 53, *sub-ss.* 1, 2.

By proviso (*a*) to s. 105 of the County Courts Act, 1934: "Provided that, without the leave of the judge, there shall be "no appeal—(*a*) in any action founded on contract or tort . . . . "where the debt of damages claimed does not exceed 20*l.*"

In proceedings of this nature the claim made in the particulars of claim was for more than 20*l.* but a payment reducing the claim to less than 20*l.* was made by the defendant after the proceedings had been commenced but before the particulars of claim had been served:

Held, that an appeal lay from the decision of the county court judge without his leave. It was the amount of the claim in the particulars of claim that had to be taken into account, unless the claim has been expressly amended so as to reduce it below 20*l.*

Pearce v. *Bolton* [1902] 2 K. B. 111 and *Lamb Brothers* v. *Keeping* [1914] W. N. 225, approved and applied. *Mayer* v. *Burgess* (1855) 4 E. & B. 655, explained and distinguished, and *North* v. *Holroyd* (1868) L. R. 3 Ex. 69 distinguished.

The plaintiff had purchased a typewriter from the defendant for 20*l.* She subsequently spent 11*l.* 10*s.* on overhauling it. Unknown to the parties the typewriter had been stolen and the plaintiff had to return it to the owner. The plaintiff claimed from the defendant under the warranty that she should have quiet possession implied in the contract of sale by virtue of the provisions of s. 12 of the Sale of Goods Act, 1893, repayment first of the sum of 20*l.* the purchase price she had paid and in addition 11*l.* 10*s.* being the sum she had spent on overhaul. The defendant repaid the 20*l.*, but contended that he was not liable for the moneys spent on overhaul. The county court judge held that, although the plaintiff had done "the ordinary and natural "thing" in having the typewriter overhauled, she was not entitled to recover the cost of such overhaul from the defendant, as it was not a loss due to the fact that the defendant had sold an article to which he had no title.

Held, allowing the appeal, that there had been a breach of the warranty implied in the contract of sale by s. 12 of the Sale of Goods Act, 1893, that the buyer should have and enjoy quiet possession of the goods. The plaintiff was entitled under s. 53, sub-s. 1 of the Act of 1893 to treat the breach of the implied condition that the seller had a right to sell the goods as a breach of warranty. The cost of overhauling the typewriter was a loss "directly and naturally resulting, in the ordinary course of events "from that breach of warranty" within s. 53, sub-s. 2, which the plaintiff was entitled to recover from the defendant.

Bunny v. *Hopkinson* (1859) 27 Beav. 565; *Rolph* v. *Crouch* (1867) L. R. 3 Ex. 44; and *Victoria Laundry* (*Windsor*) *Ld.* v. *Newman Industries Ld., Coulson & Co. Ld. Third Party*, ante p. 528, considered.

APPEAL from Bow county court.

On January 2, 1947, the plaintiff purchased from the defendant a second-hand typewriter for 20*l.* and spent a further sum of 11*l.* 10*s.* 0*d.* in having it overhauled and put in good order. Unknown to the defendant the typewriter had been stolen and in September, 1945, the police intervened and compelled the plaintiff to give it up to the rightful owner. The plaintiff claimed from the defendant the price of the typewriter and the further sum spent on it making together 31*l.* 10*s.* 0*d.* The defendant paid 10*l.* only and then on December 30, 1948, the plaintiff commenced proceedings in the county court, the relief claimed in the particulars of claim being for the balance of 21*l.* 10*s.* 0*d.* On January 4, 1949, the defendant wrote to the plaintiff's solicitors enclosing a further sum of 10*l.* and by a letter dated January 5, the plaintiff's solicitors acknowledged receipt and said: "This "leaves a balance in respect of the debt amounting to "11*l.* 10*s.* 0*d.*" The particulars of claim were not served on the defendant by the officer of the court until January 13.

The county court judge, while finding as a fact that the plaintiff had "behaved in a commonsense way" and that she had done the "natural and proper thing" in having the typewriter overhauled, dismissed the action. The plaintiff appealed but the defendant took the preliminary objection that, as the claim had admittedly been for less than 20*l.*, the appeal could not be brought without the leave of the county court judge, which had not been obtained.

J. N. Watkins (*R. O'Sullivan K.C.* with him) for the defendant. The letter accepting the sum of 10*l.* and saying that only 11*l.* 10*s.* 0*d.* remained due was equivalent to an amendment of the particulars of claim, especially as the letter was sent before service of the particulars of claim. It followed that the claim when it came before the county court judge was for 11*l.* 10*s.* 0*d.* only and he so treated it. It followed that there was no right of appeal without the leave of the court having regard to proviso (*a*) to s. 105 of the County Court Act, 1934: "Provided that, without the leave of the "judge, there shall be no appeal—(*a*) in any action founded "on contract or tort . . . . when the debt or damage claimed "does not exceed 20*l*." In *Dreesman* v. *Harris* (1) the claim exceeded 20*l*., but the judgment was only for about 12*l*. It was held that nothing had occurred to take away the right of appeal which at that time only lay for claims exceeding 20*l*. That case is distinguished because nothing had occurred to alter the amount of the claim. In *North* v. *Holroyd* (2) the judge granted an amendment of a claim which had only been below 20*l*. by reason of a miscalculation in the particulars of claim. That was held not to deprive the defendant of the right of appeal. The recent case of *Brett* v. *Thrower* (3) is not really in point. (He was stopped.)

H. C. Leon for the plaintiff, s. 105 refers only to the claim at the date of the summons. That is the test. The material words in s. 105 are "debt or damage claimed," and light is thrown on these by their use in ss. 40, 44, 47 and 58. In Or. 47, rr. 5 and 6, the scales of costs to be awarded are laid down. Scale B is in respect of claims exceeding 20*l*. and not exceeding 50*l*., and here the defendant was given costs on scale B. This assists the view that the material question is the amount of the original claim. The judge could only reduce the scale for costs if he allowed an amendment of the claim before judgment. Otherwise the whole question is what was originally claimed and that applies to give a right of appeal here under s. 105 without leave.

[LORD GREENE M.R. referred to *Mayer* v. *Burgess* (4).] In that case the original claim was dishonest or excessive and Lord Campbell therefore had regard to the true amount of the claim which did not exceed 20*l*. A case where a sum was paid after the issue of the writ but before the proceedings were known to the defendant is *Lamb Bros.* v. *Keeping* (5). That case is directly in point, for it was held that, although the bulk of the claim had been paid before the writ was served, the plaintiff must be treated as having recovered the whole amount of the claim. The fact that payment was made in ignorance of the writ did not distinguish that case from *Pearce* v. *Bolton* (1), where a payment was made after an appearance had been entered.

---

(1) (1854) 9 Ex. 485.
(2) (1868) L. R. 3 Ex. 69.
(3) [1945] K. B. 521.
(4) (1855) 4 E. & B. 655.
(5) [1914] W. N. 225.

R. O'Sullivan K.C. replied.

Lord Greene M.R. The action which has given rise to the present appeal was an action in the Bow County Court in which the plaintiff was claiming against the defendant a certain sum in the following circumstances.

[His Lordship stated the facts as far as the hearing of the action.]

The action went to trial. No amendment of the particulars had been made, and on the face of the particulars the claim as it came before the county court judge was a claim for 21*l.* 10*s.* 0*d.* When the case was opened it appeared from an agreed note prepared by the two solicitors that the solicitor for the plaintiff in opening the case stated either that it had been agreed, or that it was then agreed, that the defendant had paid the plaintiff a second sum of 10*l.* after the date on which the summons was issued, and that the plaintiff's claim on the date of the hearing was for 11*l.* 10*s.* 0*d.* and costs. The action proceeded and the plaintiff failed to recover that sum and the action was dismissed, and judgment entered for the defendant with costs on Scale B. Scale B is the scale applicable in cases where a defendant is successful in an action in the county court in which the amount claimed is greater than 20*l.* and not greater than 50*l.* In the case of a successful plaintiff his costs, of course, are governed by the scale applicable to the amount that he recovers. The judge in awarding costs on Scale B clearly awarded them, as it seems to me, on the footing that that was the scale applicable in view of the amount claimed. It was suggested that he had given costs on that scale in exercise of his discretion. On the facts I see no reason for thinking that he was exercising any discretion at all, and I am not even satisfied that he had any discretion to award costs on a higher scale than that laid down in the county court rules. The defendant therefore was given costs on the footing that he had been successful in an action in which the amount claimed was over 20*l.*

The plaintiff is appealing against the judgment because she maintains that she ought to have obtained judgment for 11*l.* 10*s.* 0*d.* The defendant takes a preliminary point and says: In view of the fact that the amount claimed in the action ought on a true view of the liability to be taken as 11*l.* 10*s.* 0*d.* only, there is no appeal without leave of the judge, and no such leave having been obtained this court has no jurisdiction to hear the plaintiff's appeal. The section of the County Courts Act which is relevant is s. 105. The proviso (*a*) to that section which gives the right of appeal is as follows: "Provided that without the leave of the judge "there shall be no appeal (*a*) in any action founded on contract "or on tort (other than an action for the recovery of land or "an action in which the title to any hereditament has come in "question) where the debt or damage claimed does not exceed 20*l.*" The controversy between the parties turns, in my opinion, on the true construction of the phrase "debt or damage "claimed." On the one hand, it is said that the claim was fixed at the time when the particulars were issued, and at that date, and all through the hearing and right down to the end, the claim on the face of the particulars was 21*l.* 10*s.* 0*d.* It was also said that, in order to issue her plaint, the plaintiff had to pay fees relevant to a claim for 21*l.* 10*s.* 0*d.*, and she was forced to do that because when she first started her proceedings the defendant was in default. He owed her 21*l.* 10*s.* 0*d.* and the only way she could get it back was by taking proceedings against him. It was pointed out, moreover, that when the matter was tried the judge gave the defendant costs on a scale which was only applicable to a claim of that amount. It was said that the defendant, having had the benefit of that view, now was turning round and saying "No, the claim must be treated for the purpose of the right "to appeal as a claim only for the balance." The defendant's case really comes down to this, that you must look and see what the substance of the position was when the case was opened before the county court judge. It was said that the true claim was the claim as it stood on the substance of the position and not on the form of the pleadings or on matters as they stood when the pleadings were first issued, when the claim had to be formulated by regard to the situation at that moment. As I have said, this case comes down really to a question of construction of the words "debt or damage "claimed." If "claimed" means claimed on the face of the pleading, or claimed at the moment when the pleading was issued in view of the state of affairs then existing, then quite clearly the defendant is in the wrong. If, on the other hand, "claimed" means not the claim as it was made in that way, but the claim as reduced by something which happened since, then the defendant would be right. What Mr. O'Sullivan and Mr. Watkins say is that regard must be had to the substance of what happened. True it is that on the face of the pleading and at the moment when the pleading was issued and in view of the circumstances warranting its issue the claim is a claim for 21*l.* 10*s.* 0*d.* Nevertheless that claim must be taken as having been in effect amended so as to make it a claim only for 11*l.* 10*s.* 0*d.* Although no formal amendment was ever made, nevertheless, as soon as it was agreed that all that the plaintiff could get judgment for was 11*l.* 10*s.* 0*d.*, the claim which up to that date was properly described as a claim for more than 20*l.* had ceased to be a claim for more than 20*l.* and had become a claim for 11*l.* 10*s.* 0*d.*

---

(1) [1902] 2 K. B. 111.

There is one matter which appears to me to throw a very important light on the whole of this controversy. It is impossible to my mind to treat the construction of the phrase "debt or damage claimed" in this proviso without reference to Or. 47, r. 6, which deals with costs. It says that the costs of a defendant are, in the circumstances there mentioned, to be determined by the amount claimed, and as regards the costs of the plaintiff, by the amount recovered. If the plaintiff had succeeded in her claim for 11*l.* 10*s.* 0*d.*, I ask myself what would have been the amount which she could be said to have recovered in the action. It is to be observed that the rule does not say "the amount of the "judgment recovered," but "the amount recovered." As one step in the construction of those words I may refer to the case of *Pearce* v. *Bolton* (1), a decision of a Divisional Court consisting of Channell J., Darling J. (who dissented) and Lord Alverstone C.J. That was a case in which the true meaning of the phrase "amount recovered" had to be construed in relation to a set of circumstances where, after the writ had been served, or at any rate, brought to the notice of the defendant, the defendant made a payment on account, with the result that the plaintiff only recovered the balance. The question was whether the amount recovered for the purposes of costs was the amount not merely of the judgment, but that amount together with the amount paid on account. It was decided that the latter was the proper amount because,

(1) [1902] 2 K. B. 111.

C. A.

1949

MASON v. BURNINGHAM.

Lord Greene M.R.

although the amount paid on account was not part of the judgment, it was recovered in the action within the true meaning of the rule. Channell J., referring to the sum in question, which was 27*l.*, said (1): "The whole of that sum "has got into the pockets of the plaintiffs since they brought "their action." Then he says: "If the plaintiffs had stated "in their particulars that the 8*l.* for which they gave credit "had been paid since the action was brought, and had claimed "the balance—19*l.*—only, and had got judgment for that "sum, then it would have appeared on the proceedings that "they had got, since action brought, the whole sum they "claimed." The matter was taken a little further by the subsequent case in the Divisional Court, of *Lamb Brothers* v. *Keeping* (2). That was a case where the amount paid on account had been paid by the defendant after the issue of the writ but before he knew it had been issued. It was argued that the decision in *Pearce* v. *Bolton* (1) did not cover this case on the ground that it was not knowledge that the writ had been issued that brought the defendant to make the payment on account. That was overruled by the Divisional Court, consisting of Ridley J. and Bray J., who said that the fact that the defendant did not know that the writ had been issued did not distinguish the case from *Pearce* v. *Bolton* (1), and that, according to the decision in that case, the sum in question had been recovered in the action. If that decision be right, the result in this case would be that had the plaintiff succeeded in obtaining judgment for 11*l.* 10*s.* 0*d.* she would have been entitled to costs on the scale applicable to the sum recovered being 21*l.* 10*s.* 0*d.*, because she would have recovered that sum since the issue of her proceedings, partly by payment on account and partly by her judgment. For the purpose, therefore, of costs she would have been entitled to costs on the basis of 21*l.* 10*s.* 0*d.*, the basis on which she had already paid the necessary fees when she started her proceedings. Correspondingly, the defendant in this case, having succeeded in the action, got his costs on the basis that he had succeeded, not in resisting a claim for 11*l.* 10*s.* 0*d.*, but in resisting a claim for 21*l.* 10*s.* 0*d.* In my opinion, the decision of the Divisional Court which Mr. O'Sullivan has criticized was perfectly right. If it was not right all kinds of refinements might arise. A man who knew that a writ was on the point

---

(1) [1902] 2 K. B. 111.

(2) [1914] W. N. 225.

C. A.

1949

MASON
v.
BURNINGHAM.

Lord Greene M.R.

of being issued and made a payment on account after it had been issued but before the plaintiff could have brought its issue to his notice, could then say: "The amount that you "have recovered is not recovered in the action." That appears to me to produce a very unreal situation because, as all of us know, people pay up when the writ is in the air or in the pocket of the plaintiff, and to say that a matter of seconds one way or the other in such a case may make all the difference appears to me to be wrong and to ignore the substance of the position. In this case the amount paid on account was recovered after the plaint was issued, and it appears to me, on the authority of the case I have mentioned, which I agree was rightly decided, that the defendant cannot say that the amount which would have been recovered by the plaintiff would only have been 11*l.* 10*s.* 0*d.* within the meaning of the rule. Similarly, the defendant having got costs applicable to a claim of 21*l.* 10*s.* 0*d.* without any protest by him and without any scintilla of suggestion that the judge was asked to exercise or that he was exercising any discretion, it seems to me that must have been based on the view, which in my opinion was the correct view, that the claim must be treated as a claim for 21*l.* 10*s.* 0*d.* The justice of the case seems to me to be secured by that when one remembers that, owing to the default of the defendant, the plaintiff was obliged to issue her plaint and to pay the fees applicable to the amount then claimed. If it was afterwards going to be said: "Oh, "no, your claim was a claim for the lesser amount," the result would be that in a case when the plaintiff succeeded the defendant would be saved from having to pay costs referable to the higher amount which, by the defendant's default, the plaintiff had been compelled to claim.

Some other authorities have been referred to but I think I need only mention two of them. One, which frankly I feel some difficulty in understanding as it is reported, is *Mayer* v. *Burgess* (1). Before I refer to that I must just state what the statutory position was. The Act of 9 and 10 Vic. c. 95, had conferred upon the county courts jurisdiction up to 20*l.*; there was no appeal. The Act of 13 and 14 Vic. extended the jurisdiction and gave a right of appeal in cases which could only be brought by reason of that extended jurisdiction. The case in question was brought in the county court after the passing of the second of those two Acts which increased

(1) 4 E. & B. 655.

the county court's jurisdiction up to 50*l.* The plaintiff's demand on the face of his particulars was for 20*l.* 1*s.* 0*d.* as damages from the defendant on three stated grounds. There was nothing, as I read the report (which is not very satisfactory) on the face of that claim to suggest that the claim was not for a perfectly correct amount in law; and had such an action been brought before the passing of the second of those two Acts the county court would have been bound, in my opinion, to disclaim jurisdiction, because it would have had presented to it a claim for more than 20*l.* According to the report, in the trial of the action it was established that the plaintiff's right was confined to a sum of 12*l.* 17*s.* 8*d.* It was argued by counsel, who was objecting to the right of appeal, that the case must be regarded as though the claim was one for 12*l.* 17*s.* 8*d.*, and he said: " Here the amount really sued " for was 12*l.* 17*s.* 8*d.*, the amount of the debt and costs. " The defendant was answerable to the plaintiff for no more." That, as I have said, was only brought out when the action came to trial. Counsel on the other side, after referring to the language of 9 and 10 Vic., said: " ' Where the debt or " ' damage claimed is not more than 20*l.* and the legislature " must have had in view the amount claimed not the amount " ultimately recovered: otherwise the jurisdiction would " depend upon the result of the cause, which may be uncertain " to the last. The amount claimed is that for which the " plaint is entered and the fees paid." In a very short report of the judgment Lord Campbell C.J. (and Coleridge J., Wightman J. and Crompton J. concurred) said this (1): " We " must look at the real nature of the cause, not at the amount " claimed. It is clear that here so much as 20*l.* could not have " been recovered; so that there was jurisdiction under " Statute 9 and 10 Vic., c. 95, s. 58." I cannot understand that. The claim was a claim for 20*l.* 1*s.* 0*d.* and on the footing of that, with great respect, I cannot see how it can have been said on the facts as reported, that there would have been jurisdiction under 9 and 10 Vic. If the plaint had been brought to the county court when 9 and 10 Vic. was the only statute on the statute book the county court would have been bound to reject it. Then he goes on to say there was jurisdiction under the earlier Act and that it was not given by the later Act in which case only an appeal lies. That I follow. If there had been jurisdiction under the earlier Act

(1) 4 E. & B. 655.

the later Act was not necessary to give that jurisdiction, and as the right of appeal was only given in cases where the later Act came into operation, the decision would have been intelligible. I cannot help thinking that this was a case where there was some evidence of mala fides of some sort in the formulation of the original claim—and I am bound to say that when I first read it, I thought it stood out on the face of the report, although now I am not sure that it does stand out as plainly as I thought. But if it was a case where the court came to the conclusion that the original claim had been written up to 20*l.* 1*s.* 0*d.* mala fide and for the sole purpose of trying to stretch the claim into a figure which would give a right of appeal, the court might very well have taken a strong line and not treated the case as a genuine claim for 20*l.* 1*s.* 0*d.* On that basis I can understand the decision. Apart from some consideration of that sort, I cannot understand the decision and I cannot take it as compelling me to decide in favour of the defendant in this case.

The other case was *North* v. *Holroyd* (1). That was an action in which the particulars of claim started with the sum of 54*l.* and set out various reductions which brought it down to 19*l.* 12*s.* 0*d.*, but on the face of the particulars it appeared that there was a miscalculation. The result was that the amount actually claimed was 20*l.* 12*s.* 0*d.* The miscalculation, however, was as I say, apparent on the face of the particulars, and when it was pointed out to the judge, the judge had the particulars amended, and so brought the amount up to 20*l.* 12*s.* 0*d.*, the true figure. Although the amendment was formally desirable it was not necessary, because on the true construction of the particulars in that case the amount of the claim was the amount arrived at by deducting the stated deductions from the sum of 54*l.* The fact that there was a miscalculation somewhere in the document does not seem to me to make it anything but a claim for the true figure of 20*l.* 12*s.* 0*d.* Kelly C.B. in giving judgment, said: "The particulars of demand claim the "balance of an account. It is true that a sum of 19*l.* 12*s.* 0*d.* "only is claimed in form; but the amount really claimed is "the balance of 54*l.*, after the deduction of certain items, the "miscalculation of one of which reduces the claim to the "sum named. In substance, therefore, it is a claim not to

---

(1) L. R. 3 Ex. 69.

"19*l.* 12*s.* 0*d.*, but to 20*l.* 12*s.* 0*d*; and the plaintiff would "have been entitled to have his particulars amended so as to "enable him to claim that sum; such an amendment would "be made as a matter of course." As I have said, that was a mere slip in adding up figures, and it appeared on the face of the particulars that it was a mere slip and what the real figure was. It seems to me that "the substance of the matter" there is a phrase used with a very different signification from that with which Mr. O'Sullivan wishes to use it in this case. The substance of the matter there was that the claim was for the larger amount. The substance of the matter here was nothing of the kind. The claim was for the larger amount in truth and in fact, but the position had been changed by something that had happened since the claim was formulated and which could only have been corrected by way of amendment, if it had been asked for, by altering the amount claimed in truth and in fact, not in correcting a mere slip. I do not read that case, either, as carrying the defendant's argument any further.

In the result the preliminary point, in my opinion, fails.

EVERSHED L.J. I agree, and I only venture to add one word about the case of *Mayer* v. *Burgess* (1), to which my Lord has referred, because in the notes to the County Court Practice the case is cited as authority for this proposition "If the nature of the case is such that the judge cannot lawfully "give higher damages than 20*l.* there is no right of appeal." That sentence, of itself, might, I think, lend colour to the view that the test should be applied when the judge came to deliver judgment. The Master of the Rolls has pointed out that *Mayer* v. *Burgess* (1) is not entirely easy to follow, for the reasons which he has stated; but it seems to me plain that what the court did eventually decide in that case was that from the very start the action in question had the quality that it was in reality and substance only a claim for a sum of less than 20*l.* I think that limitation must be read into the sentence in the notes. As my Lord has pointed out, in this case, at the time when the action started, it had the quality of being a claim for 21*l.* 10*s.* 0*d.* I agree that, unless it can be shown that it somehow lost that quality, it retained it for the purpose of the construction of s. 105, where the words might have been used, but are not used, such as are used in s. 58, "the only "matter remaining to be tried," etc.

---

(1) 4 E. & B. 655.

I would only add further, that in a case where there had been an amendment of the plaint the result might be different: but there had not been an amendment in this case, and I therefore prefer to say nothing further on that hypothesis.

SINGLETON L.J. I agree.

Preliminary objection overruled.

H. C. G.

The defendant's preliminary objection having been overruled argument was heard on the issue raised by the appeal.

H. C. Leon and *W. E. Behrens* for the appellant, the plaintiff. If, in the normal course of dealing with goods which he had purchased a buyer incurs expense and if by reason of a breach of the contract for sale the goods are taken away from the buyer, the expenses which the buyer has incurred are damages which flow naturally from the breach of contract and for which the seller is liable under the first rule laid down in *Hadley* v. *Baxendale* (1), whether such damage was in the contemplation of the seller or not. If the buyer can show that the damage was in the contemplation of the seller, he can recover under the second rule laid down in *Hadley* v. *Baxendale* (1) whether such damages flow naturally from the breach of contract or not. It is a question of fact whether the damages in any particular case flow naturally from the breach. Here the county court judge found that the plaintiff in having the typewriter overhauled did "the ordinary "and natural thing" and what she did was "right and proper." Accordingly, he should have given judgment for the plaintiff. Here there has been a breach of the condition that the defendant had a right to sell the goods and of the warranty that the buyer shall enjoy quiet possession implied in the contract of sale by s. 12 of the Sale of Goods Act, 1893 (2). The costs of the overhaul are damages directly and naturally resulting from the

(1) (1854) 9 Ex. 341.

(2) The Sale of Goods Act, 1893, s. 12: "In a contract of sale, "unless the circumstances of the "contract are such as to show a "different intention, there is— "(1.) An implied condition on the "part of the seller that in the case "of a sale he has a right to sell the "goods, and that in the case of "an agreement to sell he will have "a right to sell the goods at the "time when the property is to "pass: (2.) An implied warranty "that the buyer shall have and "enjoy quiet possession of the "goods . . . ."

breach of warranty within s. 53, sub-s. 2 of the Act of 1893 (1). He referred to *Lock* v. *Furze* (2); *Rolph* v. *Crouch* (3); and *Bunny* v. *Hopkinson* (4).

O'Sullivan K.C. and *J. N. Watkins* for the respondent, the defendant. In this case both the defendant and the plaintiff were innocent. Neither was aware of the fact that the typewriter was stolen. There was no evidence that the amount spent on the overhaul of the typewriter was spent immediately after the purchase. What the plaintiff is relying on is the breach of the condition implied by s. 12 of the Act of 1893 that the seller has a right to sell the goods. This is a condition as to title and all the plaintiff is entitled to be paid is the purchase money and no more. He referred to *Rowland* v. *Divall* (5); *Niblett Ld.* v. *Confectioners' Material Co. Ld.* (6); *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* (7). The implied warranty for quiet enjoyment does not extend to the case of eviction by title paramount to that of the seller. Under s. 53, sub-s. 2, the damages must flow directly and naturally in the ordinary course of things from the breach of warranty. It would be wrong to impute to the seller at the date of the contract a knowledge that the buyer would have the typewriter overhauled. The expenses of such overhaul are not damages naturally flowing from the breach of warranty for quiet possession.

SINGLETON L.J. stated the facts and continued. The case was heard by the learned county court judge on February 10 of this year, and his judgment was in favour of the defendant. The only amount he had to consider was 11*l.* 10*s.* 0*d.* In the course of his judgment the learned judge said: "I agree that the "plaintiff behaved in a commonsense way. She converted "a good typewriter into a first-class one. She did the ordinary "and natural thing." The only evidence as to the condition of the typewriter was that of the plaintiff herself, who said that when she tested the typewriter it was "fairly good." No evidence was given by the defendant at all. The learned judge went on to say: "It is natural to assume at first sight "that the defendant must pay for this, but, if so, anything "which a purchaser might naturally do must be a loss for which "the defendant would be responsible. Is anything which "the purchaser does to the article such a loss? That cannot "be. Suppose the purchaser decided to paint the typewriter "with gold paint, no one would argue that the defendant was "liable. Yet, if the purchaser were a dealer, gold paint "might add to its price."

---

(1) The Sale of Goods Act, 1893, s. 53, sub-s. 1: "Where there is "a breach of warranty by the "seller, or where the buyer elects, "or is compelled, to treat any "breach of a condition on the "part of the seller as a breach of "warranty, the buyer is not by "reason only of such breach of "warranty entitled to reject the "goods; but he may (*a*) set up "against the seller the breach of "warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller "for damages for the breach of "warranty."

Sub-s. 2: "The measure of "damages for breach of warranty "is the estimated loss directly and "naturally resulting, in the "ordinary course of events, from "the breach of warranty."

(2) (1866) L. R. 1 C. P. 441.

(3) (1867) L. R. 3 Ex. 44.

(4) (1859) 27 Beav. 565.

(5) [1923] 2 K. B. 500.

(6) [1921] 3 K. B. 387, 398.

(7) Ante p. 528.

In those two passages the learned judge is failing to approach the matter in the right way. The question to be considered was whether or not it was the natural and ordinary thing that the purchaser of a secondhand typewriter of this kind should have it overhauled, and the learned judge had already said that that was the fact, because he said, "She did the ordinary "and natural thing." He went on to say: "I hold that the "extra amount spent on the article by the plaintiff quite "naturally is not a loss due to the fact that the defendant "sold an article which he should not have sold. Although "what the plaintiff did was right and proper, I must decide "against her."

Mr. Leon, on behalf of the plaintiff, submitted to this court that that judgment was wrong and ought to be reversed. His argument was based almost wholly on two sections of the Sale of Goods Act, 1893. He referred the court to two cases further back in date which are of interest. Both these cases have to do with land. The first of them was the case of *Bunny* v. *Hopkinson* (1). In that case "A. sold some building "land to B., and he covenanted for title. After some houses "had been built on the land, the purchaser was evicted. Held, "that the purchaser was entitled to recover upon the covenants, "not only the value of the land, but also that of the houses "subsequently built thereon." Romilly M.R., in the course of a very short judgment, said (2): "I am of opinion that the

(1) 27 Beav. 565. (2) Ibid. 567.

"measure of the damages upon these covenants includes "the amount expended in converting the land into the purposes "for which it was sold."

The other case was *Rolph* v. *Crouch* (1), in which "The "defendant demised premises for a term of years to the "plaintiff, and covenanted that the plaintiff should occupy "the same during the term 'without any interruption whatso-"'ever from or by the said defendant, his executors, etc., "'or any other person or persons lawfully claiming by, from, "'or under him or them.' An action of trespass was after-"wards brought by a person claiming under the defendant "against the plaintiff, who gave notice of it to the defendant. "The defendant paid no attention to the notice, and the "plaintiff, acting on his own judgment and without express "authority, defended the action. A verdict was eventually "found against him, and he was obliged to pay damages and "costs. In an action against the defendant, his landlord, "for breach of the covenant for quiet enjoyment contained "in the demise: *Held*, that the plaintiff was entitled to "recover from the defendant the costs and damages he had "paid, and also the expenses he had himself incurred in "defending the action of trespass."

It appeared in that case that there was a further claim to damages because the purchaser, or the lessee, had expended money in erecting a greenhouse on the land demised in reliance on the defendant's covenant and had lost the profits he would have acquired from the sale.

Kelly C.B., said (2): "Under these circumstances, I am of "opinion that the plaintiff was justified in the course which "he took, and therefore that the damages, costs and expenses "which he incurred in the action brought against him by Cook, "are the natural and immediate consequence of the defendant's "breach of covenant"; and later in his judgment the learned Chief Baron added, "Then, lastly, as to the conservancy, "the plaintiff, relying on the performance by the defendant "of his covenant, erected it for the better and more "conveniently carrying on of his trade as a florist. He "has lost the use of it, and I think that he is entitled to the "sum given him by the jury for that loss."

Those cases, though on different subject-matter, are in point, but really in order to come to a decision on this matter

(1) L. R. 3 Ex. 44. (2) Ibid. 49.

C. A.

1949

MASON v. BURNINGHAM.

Singleton L.J.

one has to look first at s. 12 and then at s. 53 of the Sale of Goods Act, 1893.

The particulars of claim in this action, claim under both heads of s. 12, but in this court Mr. Leon has put forward only that there was breach of an implied warranty that the buyer should have and enjoy quiet possession of the goods. Mr. O'Sullivan in his submission to the court submitted that there was and was alleged to be a breach of the implied condition in sub-s. 1, on the part of the seller that he had a right to sell the goods, and Mr. O'Sullivan submitted that that would give rise only to a claim for the return of the money paid and that it would not give a general right of action for damages. It appears to me that that matter has really little to do with this case, because in any event, if there was breach of the implied condition, the plaintiff was entitled to treat that as a breach of warranty.

As regards the damages, Mr. O'Sullivan submitted that it was not shown that the defendant had any foreknowledge that this kind of damage might flow in case there was a breach. He further submitted that there was no evidence to show that the overhaul of the typewriter took place at once or soon after the purchase, and, unless that was shown, he submitted the damage would not flow and did not flow naturally from the breach. No such point as the second of those points was raised at the hearing at the court below, and no suggestion whatever was made to the plaintiff that she did not send the typewriter to be overhauled soon after she purchased it. It was accepted, as far as one can see, that she had in fact done so.

On the submission that the defendant had no foreknowledge that this kind of damage might flow, we were referred to the judgment of this court, delivered by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* (1), and in particular to a passage in the judgment where the Lord Justice said: " What was at that time reasonably foreseeable " depends on the knowledge then possessed by the parties, or, " at all events, by the party who later commits the breach. " For this purpose, knowledge ' possessed ' is of two kinds— " one imputed, the other actual. Everyone, as a reasonable " person, is taken to know the ' ordinary course of things ' " and consequently what loss is liable to result from a breach " of contract in that ordinary course."

---

(1) Ante p. 528, 539.

In the present case the learned county court judge found that the plaintiff " behaved in a commonsense way," that she did " the ordinary and natural thing," that what she did was " quite naturally " done, and that it was " right and proper." In those circumstances I see no answer to this: That which followed followed directly and naturally: it resulted in " the ordinary "course of events": damages have to be assessed under sub-s. 2 of s. 53 of the Sale of Goods Act, 1893, and those damages resulting from the breach of warranty on the part of the seller would have been, if there had been no payment on account, the total amount of 20*l.* which she paid for the typewriter and the amount which she " rightly " and " properly " and " naturally " expended to have it overhauled and put in proper order.

The learned county court judge in my view approached this matter from the wrong angle: he ought to have held that the plaintiff was entitled to the sum of 11*l.* 10*s.* 0*d.*, which was the balance remaining due, and in my view the judgment ought to be set aside and judgment entered for the plaintiff.

EVERSHED L.J. I agree. With all respect to the argument of Mr. O'Sullivan, I think it is impossible to hold that the plaintiff here was confined to such remedy as she might have had as upon a breach of condition. I add nothing on that point to what has already fallen from Singleton L.J., and it follows that she was entitled to sue, as she does sue, for breach of warranty.

If that be so, then there can be only two questions: first, was the warranty broken? and second, if so, what were the damages that flowed from it? It is, I think, not really in dispute that the warranty, whether for title or quiet possession, was broken; but as regards the damages the argument has been put that it is not established in fact that the work done to the typewriter was done at a time which relates it sufficiently to the transaction of purchase and sale which is the contract in question. Nay, further, Mr. O'Sullivan says that the language of the learned judge (namely, that the amount spent by the plaintiff quite naturally is not a loss due to the fact that the defendant had sold an article he should not have sold) is a finding of fact negativing the application to the sale in question of s. 53, sub-s. 2 of the Act. In my judgment that is a misreading of the effect of the judgment, or alternatively, if not, it involves a misdirection by the judge of himself. When the judge found, as he did, that what the plaintiff had done was the "ordinary and natural thing," it seems to me, when you reach that part of the judgment, almost inevitably to follow that the amount spent in doing "the ordinary and natural thing" was something covered by sub-s. 2, and consequently I read it clearly as indicating that what she did was done more or less immediately after, and certainly as an immediate consequence of, the purchase of the typewriter in order to make it usable by her for typing.

I venture to think that where the learned judge fell into error was at this point. The argument appears to have been put that upon an action brought in tort by the true owner of the property against the possessor, the possessor would be entitled to claim against the true owner anything she had spent which increased the value, however and by whatever means that increased value had been arrived at. The learned judge felt that this action in contract would involve a similar kind of point, that the defendant ought to be entitled to the benefit of anything spent, whether "naturally" or in the ordinary course of things or not, in improving the value of the property. In my judgment there was no analogy between the two cases, and that being so, the logic, as it seems to me, with all respect to the learned judge's judgment, broke down and he should, having found that what she did was "ordinary and natural," have then concluded that the cost of doing it fell within the sub-section.

For these reasons I think the appeal must succeed.

LORD GREENE M.R. I am of the same opinion. There is only one matter on which I think I might usefully add a word and that is Mr. O'Sullivan's argument as to what is called, not quite correctly, the warranty for quiet enjoyment. The warranty is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. Mr. O'Sullivan at one stage of his argument said that in that sentence there should be implied an exception in the case of disturbance by title paramount; and, of course, it is familiar learning that in the case of the ordinary covenants for title upon a sale of land the covenant for quiet enjoyment does not extend to cover disturbance by title paramount. In the case of land, the ordinary covenants implied under the Law of Property Act, 1925, merely reproduced the covenants which it had been the practice of conveyancers for generations to insert in conveyances. It is to be observed that in the case of the covenant for quiet enjoyment the wording is as follows (I am quoting from sch. II. to the Law of Property Act, 1925): "that, notwithstanding anything as aforesaid, that subject-matter "shall remain to and be quietly entered upon, received "and held, occupied and enjoyed." Now, "notwithstanding "anything as aforesaid" refers back to these words, "notwithstanding anything by the person who so conveys or "anyone through whom he derives title, otherwise than by "purchase for value, made, done, executed, or omitted, or "knowingly suffered, the person who so conveys has, with "the concurrence of every other person, if any, conveying "by his direction, full power to convey." That on the face of it, limits the covenant for quiet enjoyment to the case of the person conveying and does not cover the case of eviction by title paramount. The covenant for quiet enjoyment goes on as follows, "and the benefit thereof shall be received and "taken accordingly, without any lawful interruption or "disturbance by the person who so conveys or any person "conveying by his direction," etc. Those words are quite clearly sufficient to exclude, as they do exclude, disturbance by title paramount.

It is to be observed that in the language used in the Sale of Goods Act, 1893, there is no exception for any disturbance by title paramount. The words are as I have quoted them, that "the buyer shall have and enjoy quiet possession of the goods." I invited Mr. O'Sullivan to refer us to any authority that would justify the insertion into that statutory phrase of an exception in the case of disturbance by title paramount, but he was unable to do so, and, in the absence of some such authority, I ventured to inform him in the course of the argument that I would not be prepared to introduce any such gloss on the language of the statute. He did not refer us to any authority, and, in the absence of any authority, I can only express my opinion that the statute means what it says and is not to have any such gloss put upon it. The order will be that the appeal will be allowed with costs.

Appeal allowed.

Solicitors: *Duthie, Hart & Duthie; Devonshire & Co.*

B. A. B.

1949
June 2, 3;
July 20.

Evershed M.R.,
Singleton and
Jenkins L.JJ.

WIMBUSH *v.* CIBULIA AND ANOTHER

WIMBUSH *v.* LEVINSKI

Landlord and tenant—Ground floor and basement tenancy in each case—Separate tenancy in each case of first floor rooms—Claim for possession of ground floor and basement—First floor rooms used in the one case for bedrooms and in the other for kitchen and living room—Whether ground floor and basement a dwelling within Rent Restriction Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.

In each of these cases there were two lettings first made at different times on weekly tenancy of rooms in the same house by the predecessors in title of the present landlord to the present tenant. The lettings consisted of (1.) two first floor rooms and (2.) the ground floor and basement; and the first floor rooms were used in the one case for sleeping accommodation and in the other case for the kitchen and living room. All other activities took place in each case in the ground floor and basement. The landlord gave notice in each case to terminate the weekly tenancy of the ground floor and basement and afterwards brought proceedings for possession. The question in each case was whether the ground floor and basement were a dwelling within s. 12, sub-s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, so as to entitle the tenant to hold over as statutory tenant.

Held (in each case (1.) that having regard to the principles laid down in *Curl* v. *Angelo* [1948] 2 All E. R. 189, and *Wright* v. *Howell* (1947) 204 L. T. J. 299, it was impossible to hold the ground floor and basement to constitute a separate dwelling within the Rent Restriction Acts apart from the first floor rooms where one of the essential operations of living was carried on; (2.) that each case must stand over to be referred back to the county court judge to determine as a fact whether the two parts of the house let to the same tenant at different times were the subject of distinct and separate lettings or should be treated as a combined single letting.

TWO APPEALS from Westminster county court, raising similar points.

WIMBUSH *v.* CIBULIA AND ANOTHER

The facts of this case, which are fully stated in Jenkins L.J.'s judgment, were briefly as follows:

In 1925 the first defendant obtained from the plaintiff's predecessor in title a weekly tenancy of two first floor rooms of

1949

WIMBUSH *v.* CIBULIA.

WIMBUSH *v.* LEVINSKI.

6, Newburgh Street, Soho, at a weekly rent of 15*s.*, since increased to 16*s.* 8*d.*, which were used by the first defendant as a separate dwelling, but in 1933 he obtained from the said predecessor in title a weekly tenancy of the ground floor and basement of the same house at a weekly rent of 1*l.* 1*s.* 6*d.*, since increased to 1*l.* 2*s.* 3*d.*, and in 1935 sub-let with the consent of the same landlord the front basement room to a predecessor in title of the second defendants for business purposes. As from 1933 the first defendant reorganized his arrangements using the first floor rooms as bedrooms, the ground floor front room as a workroom and the back room as a kitchen and the back basement room as a storeroom. In 1948 the plaintiff became the owner of the whole house subject to the existing tenancies. The plaintiff soon afterwards served on the first defendant a notice to quit the ground floor and basement expiring on September 20, and as the first defendant did not vacate the premises brought proceedings for possession and mesne profits.

The county court judge held that this part of the premises occupied by the first defendant was entitled to the protection of the Rent Restriction Acts, although the first defendant and his family did not sleep there but in the two first floor rooms occupied under a separate tenancy agreement, but he made an order for possession of the basement front room on the ground that it was occupied by the sub-tenants only for business purposes.

Harold Marnham for the plaintiff. The ground floor and basement do not constitute a dwelling-house or part of a dwelling-house within s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in view of the fact that there is no sleeping accommodation there. The first defendant is not therefore entitled to protection under Rent Restriction Acts as regards that tenancy. *Langford Property Co.* v. *Goldrich* (1) shows that sleeping, cooking and feeding are necessary activities of a dwelling house. Another ground for saying that the ground floor and basement were not a dwelling-house within the Acts is that they were used as business premises. Should he fail in this contention, the plaintiff must be content with the judgment giving him the front basement room, as to which there is no appeal by the second defendant. There would be no difficulty in appor-

(1) [1948] 2 All E. R. 439; [1949] 1 All E. R. 402.

tioning the rent under s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938.

[SINGLETON L.J. Why should the room sub-let be treated separately ?]

Because it was sub-let for business purposes only ; see *Lewis* v. *Purvis* (1).

[EVERSHED M.R. referred to *Barrell* v. *Fordree* (2).]

Regard must be had to the position at the relevant time. In *Gidden* v. *Mills* (3) it is pointed out that where premises are let to a tenant on such terms as he pleases, it is impossible to say from the terms of the tenancy whether the premises were let as a dwelling-house. Here, however, there has been no change over of the first floor used for sleeping purposes.

Elliot Gorst (for *John Eldon*) for the first defendant. The question turns here on several material considerations in the judge's mind when considering whether the ground floor and basement were a separate dwelling such as (1.) that food was kept in it, (2.) that cooking and feeding were carried on there, (3.) that there was a supply of water, (4.) that this dwelling was close to the sleeping accommodation in the same house, and (5.) that the two lettings were always treated as constituting together a dwelling-house except for the two separate rent books. Further the judge pointed out that there was nothing to prevent the first defendant from sleeping in the ground floor or basement, although there were separate lettings of the first floor rooms and of the premises below, they had become fused into a single dwelling. Even if that was not so the bulk of the activities were carried on in the lower premises and the one element absent was not enough to deprive that letting of the protection of the Rent Restriction Acts : *Curl* v. *Angelo* (4). This is a very different case from *Wright* v. *Howell* (5).

Harold Marnham replied.

Cur. adv. vult.

July 20. JENKINS L.J. read the judgment of the court. This is an appeal from a judgment of the Westminster county court dated February 17, 1949, on a claim by the appellant landlord

(1) (1945) 177 L. T. 267.
(2) [1932] A. C. 676.
(3) [1925] 2 K. B. 713.
(4) [1948] 2 All E. R. 189.
(5) (1947) 204 L. T. J. 299.

(Mrs. Violet Lilian Wimbush) against the respondent tenant (Mr. Harry Cibulia) and his sub-tenant (a company called Dental Supplies and Services Ld.) for possession of the two ground floor and two basement rooms in number 6 Newburgh Street, Soho, which was allowed in the county court only as regards the front room in the basement, being the part of the premises occupied by the sub-tenant. In addition to the four rooms already mentioned, the premises with which the case is concerned comprise two rooms on the first floor of number 6 Newburgh Street, of which possession is not claimed.

In 1925 the respondent took from the appellant's predecessor in title a weekly tenancy of the two first floor rooms at a weekly rent of 15*s.* 0*d.*, since increased to 16*s.* 8*d.* These two rooms were undoubtedly let to and in fact used by the respondent as a separate dwelling until 1933, his family who lived with him there consisting for the first three years or thereabouts of his wife and one daughter. The front room was used as a bedroom and the back room as a kitchen, where cooking was done on a gas stove. In 1928 a son was born to the respondent, and he asked the then landlord for further accommodation. The landlord advised him to wait a little while for accommodation in the same house. It seems that in fact he had to wait a matter of five years, but ultimately in 1933 the ground floor and basement fell vacant through the departure of the former tenant (a Mrs. Skell), and on July 21, 1933, the respondent was granted a weekly tenancy of this part of the house at a weekly rent of 1*l.* 1*s.* 6*d.*, since increased to 1*l.* 2*s.* 3*d.*

This letting of additional accommodation was not effected, as one might have expected, by a simple substitution for the existing tenancy of a new tenancy comprising first floor, ground floor and basement at one entire rent. In point of form, according to the evidence of the rent books, the transaction was carried out by keeping on foot the existing tenancy of the two first floor rooms and granting a separate tenancy at a distinct weekly rent in respect of the ground floor and basement. A new rent book was opened in respect of the ground floor and basement, and thereafter two separate rent books, one for each set of rooms, were consistently kept.

On becoming tenant of the ground floor and basement, the respondent reorganized his accommodation, turning the first floor room formerly used as a kitchen into a second bedroom, and using the back ground floor room as a kitchen and living room, the front ground floor room as a workroom for the purposes of his work as a jobbing tailor (which he had previously done away from home) and the back basement room as a larder. This reorganization seems to have been carried out with the knowledge and approval of the landlord, as the respondent before he took the tenancy of the ground floor and basement rooms told the landlord he would require the front ground floor room as a work room and the back ground floor room as a kitchen, and the landlord gave his consent to the installation of water in the back ground floor room. In 1935 (with the landlord's consent) the respondent let the front basement room (which was unsuitable as a living room) at 9*s.* 0*d.* per week to an electrical engineer for business purposes. This sub-tenant after a period of absence during the war assigned his sub-tenancy to the company already mentioned, which was a defendant in the action but has not appealed against the order for possession of the front basement room. In granting this sub-tenancy the respondent reserved to himself a right of way to the coal cellar.

The mode of user of the various parts of the premises has continued as above described down to the present time. Thus although the respondent undoubtedly now occupies the first floor, ground floor and back basement room, as one entire separate dwelling, in which he carries on all the essential activities and concerns of life, he holds the first floor on the one hand and the ground floor and back basement room on the other hand under what in point of form appear to be two distinct contractual titles, and it is this circumstance that gives rise to the difficulty in the case.

In 1948 the appellant, having recently become the owner of number 6 Newburgh Street subject to the respondent's occupation, served a notice to quit expiring on September 20 of that year in respect of the ground floor and basement, and on its expiration sued the respondent and the defendant company in the Westminster county court for possession of the ground floor and basement and mesne profits. The particulars of claim alleged that the ground floor and basement were let and used for business purposes only and were not within the protection of the Rent Restriction Acts, while the two rooms on the first floor were let and used as a residence and were within such protection; but (except as regards the room let to the defendant company) the argument actually advanced in support of the claim to possession was to the effect that the ground floor and basement were not let as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Act of 1920.

It appears that the learned county court judge did not consider the possibility that notwithstanding the formally separate character of the two lettings the true intention of the parties may have been to create the equivalent of one tenancy comprising the whole of the premises, which after the additional letting constituted in their entirety the respondent's home. But the learned county court judge found it possible to hold that the ground floor and basement (other than the room sub-let to the defendant company) were nevertheless protected by the Acts. His reasons for so holding are thus stated in his note of his judgment : " It is true that the family do not sleep on the " premises although they could do so if they so chose. The " former tenant Mrs. Skell used the workroom both as a " workroom and as a bedroom for her daughter and there is " nothing in the tenancy of Cibulia which prevents him from " using the front room in the same manner if he chose to put " up a bed say for his son. But be that as it may, in my " opinion the ground floor and basement is the true home of " Cibulia. There he and his family meet live and eat howbeit " they sleep upstairs. The food which the family eats and the " coal which the family uses is kept in the basement. In my " opinion the tenancy is protected by the Rent Restriction " Acts."

We find outselves unable to agree with the learned county court judge's conclusion. Applying the principles laid down by this court in such cases as *Curl* v. *Angelo* (1) and *Wright* v. *Howell* (2), we find it impossible to hold that the ground floor and basement of number 6, Newburgh Street by themselves ever in point of user constituted the separate dwelling of the respondent apart from the first floor rooms originally let to him, since at all times after the letting of the ground floor and basement to the respondent in 1933 one of the essential operations of living, namely sleeping, was carried on in the two first floor rooms. The circumstances in which and purposes for which the additional tenancy was granted do however seem to us to provide a fairly strong indication that although the additional letting was in form a separate transaction the true intention of the parties may well have been that the two tenancies should be treated as one " letting," or at all

(1) [1948] 2 All E. R. 189.
(2) 204 L. T. J. 299.

events should be interdependent so that the later in date was supplemental to the earlier, and so that the one could not be determined without the other. If that was the true position in fact then we think the result would be that the respondent could claim protection in respect of the whole of the premises consisting of first floor, ground floor, and back basement room in the same way as if they had all been comprised in a single tenancy agreement. But on the facts so far found, we would not feel justified in dismissing the appeal on this ground, while on the other hand in all the circumstances of the case we are not content without further investigation to accept at its face value the formally separate character of the two tenancies, with consequences fatal, as it seems to us, to the respondent's case. We are loath to put the parties to the trouble and expense of a further hearing in the county court. But matters of evidence and fact under the Rent Acts are pre-eminently matters for the county court, and we think, therefore, that the proper course in the circumstances will be to remit the case to the county court for a further hearing directed to the question whether the additional letting was truly separate and distinct from the original letting, or the real agreement to be imputed to the parties (conformably with the actual facts as to user) involved such a consolidation of or interdependence between the two lettings as to make them in effect equivalent to a single tenancy agreement extending to the whole of the premises.

The appeal should in the meantime stand over generally and be restored to the list for further argument when the question above stated has been dealt with in the county court. In considering this question the county court judge will bear in mind that the language of s. 12, sub-s. 2, of the Act of 1920, which speaks of a house or part of a house " let as a separate " dwelling," does not in terms require that the letting should be by virtue of a single instrument or contract. Proviso (iii.) to that sub-section and sub-s. 3 of s. 3 of the Act of 1939 which relate to cases where land or premises have been " let with " a dwelling-house, seem to us clearly to contemplate the possibility of separate contracts or separate transactions, and cases under sub-s. 3 of s. 3, of the Act of 1939 such as *Merrill* v. *Mann* (1) and *Lewis* v. *Purvis* (2) show that in such circumstances it is a question of fact whether the subject of the separate contract should be treated as intended to be and being separate and distinct or not.

---

(1) [1945] 1 All E. R. 708.

(2) 177 L. T. 267.

Case remitted to county court judge to determine as a fact whether the two parts of the premises occupied by the first defendant were the subject of distinct and separate lettings within the terms of this judgment.

Solicitors: *Taylor & Humbert; Siefert, Sedley & Co.*

WIMBUSH *v.* LEVINSKI.

The facts of this case are fully stated in JENKINS L.J.'s judgment and were briefly as follows:

In 1916 the defendant became the occupying tenant of the ground floor and basement (each consisting of two rooms) of 5 Newburgh Street, under a weekly tenancy, at a rent of 15*s.* 0*d.* In 1918 the defendant took a further room on the second floor of the same house paying the increased weekly rent of 1*l.* 11*s.* 6*d.* under a combined tenancy of the five rooms. The second floor room was used as a bedroom for the defendant's two daughters but in 1940 when they ceased to live there, the defendant relinquished that room reverting to his original tenancy of the ground floor and basement. Then in January, 1946, the defendant had from the same landlord a weekly tenancy of two rooms on the first floor at a weekly rent of 17*s.* 0*d.* The defendant then reorganized his use of the accommodation and used, as he still did, one of the first floor rooms as a kitchen and the other as a living room; and he used the ground floor front and back rooms as a workshop and a bedroom, the front basement for storing coal and the back one as a scullery for washing clothes. In 1948 the plaintiff who had become the owner of the house served a notice to quit expiring in September in respect of the ground floor and basement and afterwards sued the defendants for possession, arrears of rent, which were paid into court by the defendant, and mesne profits. The county court judge held that the tenancy of the ground floor and basement was protected by the Rent Restriction Acts although the defendant no longer used the basement as a living room and kitchen. The plaintiff appealed.

Harold Marnham for the plaintiff. This appeal raises the same question as in the case of the first appeal, apart from the fact that there was no sub-letting and that the rooms on the first floor are used for the kitchen and the living room. It is impossible therefore, to say that the ground floor and basement are a dwelling so as to be protected by the Rent Restriction Acts, on the tenancy being determined by notice. It is the position after the reorganization of the accommodation under the two separate lettings to which regard must be had and the absence of a kitchen from the ground floor and basement is fatal: *Turner* v. *Baker* (1). The basic principles applicable here are the same as those applying to the preceding appeal.

Norman Black for the defendant. It is submitted (1.) that the totality of the rooms occupied by the defendant in one house is one dwelling and that the basement and ground floor cannot be considered separately except as a part of that dwelling, and (2.) that the rooms on the ground floor and basement were originally let to the defendant as a separate dwelling, and (3.) that they were not disqualified from being so by anything that happened afterwards. On the first of these contentions *Curl* v. *Angelo* (2) is material. The court has to take into account the essential intention of the Rent Restriction Acts to prevent tenants from being turned out of their houses. To say that rooms in one house let by the same landlord to the same tenant do not constitute a single dwelling-house is to do violence to the English language. The mere fact of separate rent books cannot make any difference.

Harold Marnham replied.

Cur. adv. vult.

July 20. JENKINS L.J. read the judgment of the court. This appeal (which is in a sense the converse of *Cibulia's* case) is from a judgment of the Westminster county court dated February 17, 1949, in so far as it dismissed a claim by the appellant landlord (again Mrs. Violet Lilian Wimbush) against the respondent tenant (Mr. S. Levinski) for possession of the ground floor and basement of number 5 Newburgh Street, Soho. The present rateable value of the whole house is 47*l.*

(1) [1949] 1 All E. R. 560, 565. (2) [1948] 2 All E. R. 189.

The respondent has been the occupying tenant of the ground floor and basement in question (each consisting of two rooms) ever since the year 1916 when they were let to him at the weekly rent of 15*s.* 0*d.* From the commencement of his tenancy down to the year 1918 the respondent used the front ground floor room as a workshop for the purposes of his business as a jobbing tailor, the back ground floor room as a bedroom for himself and his wife, the front basement room for the combined purposes of a bedroom for his two daughters and a living room for the family, and the back basement room as a kitchen. In 1918 the respondent took a further room on the second floor of the same house, paying the increased weekly rent of 1*l.* 11*s.* 6*d.* for all five rooms. The second floor room was used as a bedroom for the two daughters who had formerly slept in the living room, but otherwise the user of the four ground floor and basement rooms remained as above described. In 1940 one of the daughters left home on getting married and the other went into the country to avoid the air raids. The bedroom on the second floor thus became superfluous and the respondent relinquished it, reverting (at a weekly rent which now stands at 1*l.* 1*s.* 2*d.*) to his original tenancy of the four ground floor and basement rooms, the user of which remained the same as before down to January, 1946. So far it is plain that the ground floor and basement from 1916 to 1918 and from 1940 onwards, and between 1918 and 1940 those four rooms plus the bedroom on the second floor, had constituted part of a house let to the respondent as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that in January, 1946, his tenancy of the four ground floor and basement rooms was within the protection afforded by the Rent Restriction Acts.

In January, 1946, however, the respondent took from the same person as was then his landlord in respect of the ground floor and basement a weekly tenancy of additional accommodation in the same house, consisting of two rooms on the first floor. As in *Cibulia's* case, this letting of additional accommodation was effected, in point of form at all events, by keeping the existing tenancy on foot in respect of the ground floor and basement and granting a separate tenancy at a distinct weekly rent (apparently of 17*s.* 0*d.* per week, since increased to 17*s.* 11*d.*) in respect of the first floor. As in *Cibulia's* case, a new rent book was opened in respect of the

1949

WIMBUSH
v.
CIBULIA.

WIMBUSH
v.
LEVINSKI.

additional rooms, and thereafter two separate rent books, one for each set of rooms, were consistently kept. On obtaining these additional two first floor rooms, the respondent reorganized his accommodation and thereafter used and is still using one of the first floor rooms as a kitchen, the other as a living room, the ground floor front and back rooms as a workshop and bedroom respectively as before, the front basement room for storing coal and the back one (which has apparently been condemned for use as a kitchen) as a scullery for washing clothes. The case thus affords a precise parallel to *Cibulia's* case in that the respondent occupies as one entire separate dwelling premises held under what in point of form at all events are two distinct contractual titles; but it is the converse of *Cibulia's* case in that the premises of which possession is here sought are those comprised in the original, and not (as in *Cibulia's* case), the additional letting. In 1948 the appellant, who had recently become the owner of number 5 Newburgh Street subject to the respondent's occupation, served a notice to quit expiring on September 13 of that year in respect of the ground floor and basement, and upon its expiration sued the respondent in the Westminster county court for possession of the ground floor and basement, arrears of rent amounting to 53*l.* 16*s.* 0*d.* down to September 13, 1948, and mesne profits at the rate of 1*l.* 1*s.* 2*d.* per week from that date. No question arises in this appeal as to the claim for arrears of rent, which was admitted, the sum claimed being paid into court by the respondent and paid out to the appellant under the judgment.

By her particulars of claim the appellant alleged that the respondent held two parts of the premises (that is, the two first floor rooms on the one hand and the ground floor and basement on the other hand) on two separate and distinct tenancies, and that the ground floor and basement were let to the respondent for business purposes only and were used by him for the purposes of his trade or business as a tailor (an allegation which if made good would exclude them from the protection of the Rent Restriction Acts), but admitted that the two first floor rooms (possession of which was not claimed) were let to and used by the respondent for residential purposes and were within the protection afforded by the Rent Restriction Acts. Before the learned county court judge and in this court the claim to possession of the ground floor and basement was supported on grounds different from those pleaded. The contention urged on the part of the appellant was that as from the date of the letting to the respondent of the two first floor rooms and his consequential reorganization of the accommodation at his disposal, the ground floor and basement ceased to be let as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Act of 1920, and consequently ceased to qualify for protection under the Acts. As in *Cibulia's* case, the learned county court judge appears to have addressed himself solely to the question whether the ground floor and basement rooms considered by themselves and apart from the two first floor rooms were let as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Act of 1920. He nevertheless found himself able, as in *Cibulia's* case, to hold that the ground floor and basement were protected by the Acts, for reasons thus expressed in his note of his judgment: " In my opinion the tenancy consisting of the " ground floor and basement is still protected by the Rent " Restriction Acts. It is the same dwelling-house as the " defendant occupied from 1916 to 1918 and from 1940 to " 1946, and the only difference in user is that instead of using " the basement as a living room and kitchen, he uses them " as a storage for coal for domestic purposes, and as a scullery " for washing clothes for domestic purposes. In my opinion " the fact that for greater ease and comfort he has taken " two rooms on the first floor on a separate tenancy for a living " room and the kitchen does not affect the question." On the footing that the two lettings are to be treated as truly distinct and independent, this conclusion is open to objections similar to those we have stated in *Cibulia's* case, the essential activities here carried on in the first floor rooms and not in the ground floor and basement being cooking and the activities normally carried on in a living room. There is, however, a not unimportant distinction in favour of the respondent in the present case (as opposed to *Cibulia's* case) in that here the ground floor and basement were the subject of the original letting and were undeniably let to the respondent in the first instance as a separate dwelling and used and occupied by him as such for many years. We prefer to express no opinion at this stage as to the sufficiency of this distinction as a ground for upholding the decision in favour of the respondent, even on the facts as at present found.

But we think, for the same reasons as we have given in *Cibulia's* case, the right course in the circumstances will

1949

WIMBUSH
v.
CIBULIA.

WIMBUSH
v.
LEVINSKI.

be to make the same order as in that case, that is to say, to remit the case to the county court for further hearing on the same question which we have stated in *Cibulia's* case, the appeal in the meantime to stand over generally and be restored to the list for further argument when that question has been dealt with in the county court.

Case remitted to the county court judge to determine as a fact whether the two parts of the premises occupied by the defendant were the subject of distinct and separate lettings within the terms of this judgment.

Solicitors: *Taylor and Humbert; C. V. Young and Cowper and Whitton.*

H. C. G.

1949
Mar. 2.

Finnemore J.

WARMAN *v.* SOUTHERN COUNTIES CAR FINANCE CORPORATION LD. W. J. AMERIS CAR SALES (THIRD PARTY)

Contract—Hire-purchase agreement—Motor-car—Defect in title of letter-vendor—Hirer—Purchaser during currency of the agreement notified of claim of true owner—Total failure of consideration—Right of hirer-purchaser to recover all payments made both before and after notification of claim of true owner—Claim by letter-vendor for rent for use of car while in possession of the hirer-purchaser—Not maintainable.

The plaintiff in September, 1947, entered into an agreement with the defendants for the hire-purchase of a motor-car. The agreement was in the usual form, the defendants were therein described as the owners of the car, the plaintiff paid a certain sum on the signing of the agreement and agreed to pay monthly for twelve months specified sums as "rent" for the hire of the car: and when all the payments were completed he was to have the option of purchasing the car for 1*s*. 0*d*. In January, 1948, he became aware that another company claimed to be the owners of the car, but continued to pay the monthly rent and in April, 1948, despite further communications from the claimants in February and March, in pursuance of his rights under the agreement paid to the defendants the remaining six monthly instalments and the 1*s*. 0*d*. in the exercise of his option. On the same day he was served with a writ by the other company claiming the return of the car, and in May he returned it to them.

Held, following *Karflex Ld.* v. *Poole* [1933] 2 K. B. 251, that it was an express condition of the contract that the defendants were at the time when they entered into the contract owners of the car

[Reported by Miss JANE GRIFFITHS, Barrister-at-Law.]

1949

WARMAN v. SOUTHERN COUNTIES CAR FINANCE CORPORATION LD. W. J. AMERIS CAR SALES (THIRD PARTY).

and entitled to give the plaintiff an option to purchase it: that the plaintiff was entitled to rely on that condition and treat it as a warranty and to continue to make the payments under the contract, notwithstanding his knowledge that some other person claimed to be the owner of the car: and was entitled to recover all moneys paid by him, whether before or after he had knowledge of that claim, as for breach of warranty.

The defendants claimed to be entitled to recover rent for the hire of the car for the seven months during which it was in the possession of and being used by the plaintiff.

Held, that the real object of a hire-purchase agreement being to enable the hirer-purchaser to buy the article in question, there had been a total failure of consideration and the defendants were not entitled to claim anything for the hire of the car.

ACTION tried by Finnemore J.

On September 13, 1947, the defendants delivered to the plaintiff, from the garage of the third party, a motor-car in pursuance of a hire-purchase agreement in the usual form of the same date, whereby in consideration of the plaintiff paying 155*l.* on the signing of the agreement and the monthly "rent" of 9*l.* 18*s.* 0*d.* for twelve months, he should have the option of purchasing the car for 1*s.* 0*d.* In the agreement the defendants were described as the "owners" of the car. They had purchased it in good faith from the third party, but in fact it was the property of the London Finance Corporation, who had hired it under a hire-purchase agreement to an individual, who without paying any money after the initial deposit, purported to sell it to the third party who bought it in good faith from him, and in good faith sold it to the defendants. The plaintiff in January, February, and March, 1948, received letters from the London Finance Corporation or their solicitors claiming the car as their property, but did not reply to them nor inform the defendants of the claim, but contented himself with consulting the third party and the Automobile Association. On April 20, having already paid to the defendants six monthly instalments under the agreement, the plaintiff, in pursuance of his right to do so under the agreement, paid in one sum the remaining six instalments due and the sum of 1*s.* 0*d.* for the option to purchase the car, and on the same day he was served with a writ by the London Finance Corporation claiming the return of the car. On April 22 the defendants credited the plaintiff with that sum, and the transaction under the hire-purchase agreement was thereby completed. In May, 1948, the plaintiff returned the car to the London Finance Corporation, and in this action claimed the sum of 294*l*. 17*s*. 3*d*. as damages for breach of warranty of title, the sum being made up of the moneys paid under the hire-purchase agreement, insurance and minor repairs to the car, and certain legal expenses incurred by the plaintiff. The defendants counterclaimed a reasonable sum for the hire of the car during the seven months when the plaintiff had the use of it.

Stanley Rees for the defendant company. There is no warranty of title in this case. The sale took place on April 22, 1948, when the final payment was made. Before that date the plaintiff had received correspondence, both from the defendant company and their solicitors, from which he should either have known that they were not the owners of the car, or at least should have realized that the title must be regarded with grave suspicion. On the very day that the last payment was made the plaintiff had received a writ from the solicitors of the London Finance Corporation, claiming the car from him. In spite of this the plaintiff took no action in the matter but continued to make the monthly payments even after he had received the letters which cast some doubt on the title of the defendant company. The damage therefore in this case flowed not from the breach by the defendant company but from the plaintiff's own conduct. If he had taken some steps to regularize the position, it may be that the defendant company would have been able to arrange with the London Finance Corporation to pay off the balance on the original hire-purchase agreement and so the plaintiff's position would have been saved.

Finally, even if in view of the decision in *Karflex Ld.* v. *Poole* (1), I must fail as regards the 155*l*. and the amount paid in April, yet it is true to say that the plaintiff did in fact enjoy the use of the car for seven months in respect of which he had agreed to pay 9*l*. 18*s*. 0*d*. per month under the hire-purchase agreement; allowance should therefore be made for the reasonable charge of hiring the car to the plaintiff for the period of seven months during which it was in his possession.

F. Mattar for the plaintiff was not called upon.

Kenneth Jones for the third party.

---

(1) [1933] 2 K. B. 251.

1949

WARMAN
v.
SOUTHERN
COUNTIES
CAR
FINANCE
CORPORATION LD.
W. J.
AMERIS
CAR
SALES
(THIRD
PARTY).

FINNEMORE J., after stating the facts and emphasizing that all the parties before the court had throughout acted in complete good faith, continued:

What in law the plaintiff is claiming is damages for breach of the hire-purchase agreement of September 13, 1947, and in particular damages for breach of the express condition or, as it must now be treated, the express warranty that the defendants were the owners of the car. Prima facie he would be entitled to such damages.

Mr. Stanley Rees, who appears for the defendants, has taken every point that he possibly could and has addressed to me an interesting argument. He says first of all that the sale took place on April 22, 1948, when the final payment was made and credited to the plaintiff, and at that date the plaintiff had cause to believe that there was something wrong with the title, and in those circumstances he could not be said to be relying on any warranty given by the defendants that they were the owners of the car. He had had a number of letters, including solicitors' letters, and on the very day on which he sent the money order for the final payment, April 20, he received a writ claiming this car from him, and therefore either knew or at least was put on grave suspicion that the car did not belong to the defendants, but to somebody else. That argument might prevail, if there had been nothing but the sale on April 22, but the agreement was made between these parties in September, 1947, and undoubtedly that agreement constituted an agreement to sell subject to the plaintiff making certain payments and exercising his option to buy, as he ultimately did.

I do not think that it would matter if at the time when there were still some payments to be made before the machinery of the contract was complete, the plaintiff had discovered and knew for certain that this car really belonged to another party. I think he would be quite entitled to say, "It has "nothing to do with me now. I made a binding agreement "with the defendants in which they gave me this warranty "that they were the owners. I am paying them the money "which is due to them in order to be able to assert my rights, "and I still rely as against them on the agreement of September, "1947." To put it in another way, when this agreement was entered into and an option to purchase was given to the plaintiff, the plaintiff would, as soon as the agreement had been signed, have been quite entitled in law to have paid the whole of the balance at sight, and to have had the ownership there and then vested in him.

The defendants, however, were clearly unable to give him any title at any moment from the time of the making of that contract up to April 22, when the final payment was made by the plaintiff and received by the defendants. It is plain that there was a breach of the agreement and it was a breach which continued throughout, and the title to which the plaintiff was entitled by his contract was never given to him, and could never have been given to him, because the title was never in the defendants at all.

I do not, however, think that the evidence goes so far as to show that the plaintiff knew positively in April, 1948, that the title was in somebody else. It is true that he had at least one solicitors' letter and some other letters, and it is true finally that a writ was served upon him. There is some question whether this was before or after he actually posted the money paid to the defendants, but even on the former assumption it was not for the plaintiff to decide whether the claim of the London Finance Corporation was good or bad. It is hardly necessary to say that the issue of a writ, still less the writing of letters, does not prove that the claim therein made is true. The plaintiff was quite entitled to say, " I am not " going to take the risk of deciding this question. I am going " to stand on my rights as against the people with whom " I contracted " ; and that, I think, is what he did.

I think it is a somewhat similar point that Mr. Rees raised when he said that the damage here flowed not from the breach by the defendants, and from the defect of their title, but from the plaintiff's own conduct. In other words, it is argued that if when he received those letters in January and February and the solicitors' letter in March, he had got in touch at once with the defendants, they would have been able to arrange with the Finance Corporation to pay off the balance on the other hire-purchase agreement and so save the plaintiff's position. Whether that would have happened or not I do not know, because when that situation did arise as between the defendants and the London Finance Corporation, and when that suggestion was made by the defendants to them, they flatly rejected it. It is quite true that they gave as one of their reasons that they were finding the plaintiff rather difficult to deal with ; but the fact remains, when a neighbourly hire-purchase company said " We will pay off the balance," the

London Finance Corporation answered " Nothing of the sort. " We are going on with our proceedings against the plaintiff." In any case, however, there was no duty on the plaintiff to have sought an explanation from the defendants. It might have been a prudent thing for him to have done so, but there was certainly no legal responsibility for him to do so. In fact, being an ordinary business man, he consulted a lawyer and later sought the advice of the proprietor of the garage from whom he had received delivery of the car, and of the Automobile Association, by whom he was told that he should approach the garage proprietor and meanwhile at all costs to continue to make his payments under the agreement, which he did.

In those circumstances I do not think that it can be said that any of the damage flowed from the plaintiff's conduct. It flowed from the fact that unfortunately the defendants purported to hire and sell to the plaintiff something which in fact was not theirs to hire or to sell, although they honestly believed that it was.

The last point made by Mr. Rees is perhaps the most difficult. I think that this case is plainly covered by the case of *Karflex Ld* v. *Poole* (1), except on one point, and that is the point raised by the defendants in these words: " At the " worst as against us you did have the use of this car for " seven months. Under the hire-purchase agreement you " were going to pay the monthly rental of 9*l*. 18*s*. 0*d*., and " while it may be true that we are wrong on the general issue " —we are plainly wrong in view of the *Karflex* case (1) with " regard to the 155*l*. and the final payment made in April— " nevertheless you ought to make allowance in the damage " for the reasonable charge of hiring that car to you over " the seven months during which you had its use."

This is an interesting point and the defendants are fully entitled to take it, for the present Lord Chief Justice, who was then Goddard J., raised this very point in his judgment in the *Karflex* case (1), but left it entirely open, without giving the least indication of any view, one way or the other. He said (2): " I am expressing no opinion as to what might be " the position if a person who was not, in fact, the owner " but who honestly believed he was the owner of property " let out on hire-purchase, was faced with a counterclaim by " a hirer who had enjoyed the use of the property, we will

---

(1) [1933] 2 K. B. 251.

(2) Ibid. 265.

"say, for half the time that the hire-purchase agreement was "contemplated to run, to recover all the money he had paid "without making some allowance for the use of the chattel. "It will be time enough to decide that when the question "arises." This appears to be the time when the question has arisen and therefore must be decided.

A hire-purchase agreement is in law, an agreement in two parts. It is an agreement to rent a particular chattel for a certain length of time. If during the period or at the end of the period the hirer does not wish to buy the chattel he is not bound to do so. On the other hand, the essential part of the agreement is that the hirer has the option of purchase, and it is common knowledge—and I suppose, common sense—that when people enter into a hire-purchase agreement they enter into it not so much for the purpose of hiring, but for the purpose of purchasing, by a certain method, by what is, in effect, deferred payments, and that is done by this special kind of agreement known as a hire-purchase agreement, the whole object of which is to acquire the option to purchase the chattel when certain payments have been made.

Now, I think it might well be right to say if at any stage the option to purchase goes, the whole value of the agreement to the hirer has gone with it. If he wanted to make an agreement merely to hire a car he would make it, but he enters into a hire-purchase agreement because he wants to have the right to purchase the car; that is the whole basis of the agreement, the very foundation of it. I should have thought, even on that broad principle, that if the defendants break the contract or are unable to carry it out they are not entitled to claim on a sort of quantum meruit and say "Anyhow, although I could "not carry out the agreement and could not give you the title "to this car, you had the use of it for six or seven months, and "you must pay the hiring charges for those months."

I think there is another way of looking at it: This car was not, at any time, the property of the defendants. I do not think that the plaintiff in any circumstances could be called on to pay to the defendants hiring money for a car which belonged to somebody else. I should have thought it was quite plain that if A. purports to hire a car to B., and in fact delivers to B. a car which belonged not to himself but to C., to which he had no right whatever in law, and during the currency of the agreement C. intervenes and asserts his right to the car, and if, in those circumstances, B. does not pay the hiring charges, A. would have no possible claim for them, because it is impossible to see how he would ever frame his case. I do not think he could come into court and say: "I claim money arising out of hiring charges from B., for C.'s "car, to which, it would appear, I had no right." I cannot think that any court would direct B. to pay A. money for the use of somebody else's car. I do not see here how the defendants, because they delivered to the plaintiff somebody else's car, can claim any kind of money from him for the use of that car. That is, it seems to me, in plain English, what the claim comes to.

As I say, it is an interesting point, and I think that must be the answer to it and it seems to me it must be the final answer to the defendants' counterclaim. I therefore take the view, that it is not open to the defendants to claim, either by way of set-off or counterclaim, money which is expressed in this hire-purchase agreement to be for monthly rentals for the months during which the plaintiff had the use of a car which was not the defendant's car at all. Therefore, I think that quite plainly there has been a breach of this agreement and the plaintiff is entitled to recover damages. I think those damages amount to the sum of 294*l.* 17*s.* 3*d.* as claimed by him.

The second part of the case is as between the defendants and the third party. Mr. Kenneth Jones appearing for the third party, most properly, if I may say so, said frankly that, assuming the defendants fail as against the plaintiff, there is nothing more really that can be said on behalf of the third party. He signed the document I have in front of me, in which he certified that the title of the vehicle was vested in him and he had the right to assign such title, that it was free from any lien or encumbrance and was not the subject of any previous transaction with the hirer and various other matters, so that the defendants were in possession, when buying this car from the third party, quite apart from any implied conditions, of this perfectly plain express statement that the third party certified that the title of the car was in him, without any charge or qualification at all. Therefore, it must be that the defendants are entitled to be indemnified by the third party and indemnified in the usual way, that is for the amount of damages they have to pay, and also for their costs to be assessed on solicitor and client basis. It is plain from the

1949

WARMAN v. SOUTHERN COUNTIES CAR FINANCE CORPORATION LD. W. J. AMERIS CAR SALES (THIRD PARTY).

third party's own pleading that they stood with the defendants on the defence that the defendants put forward.

There must be judgment for 294*l.* 17*s.* 3*d.* with costs for the plaintiff against the defendants, and then the defendants are entitled to indemnity as against the third party.

Judgment for the plaintiff against the defendants and for the defendants against the third party.

Solicitors for plaintiff: *Amery-Parkes & Co.*

Solicitors for defendants: *E. W. Parkes for Farrington & Winterton, Brighton.*

Solicitors for third party: *Ruston, Clark & Ruston.*

Reversed. C.A. [1950] 1 All E.R. 180. *Reversed.* [1950] 1 K. B. 421

1949
May 25, 26;
June 2.
Lynskey J.

HORTON *v.* LONDON GRAVING DOCK CO. LD.

Negligence—Invitor and invitee—Duty of invitor—Damage from "unusual danger"—Danger from point of view of particular invitee.

The duty of an invitor to an invitee as laid down in *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274, is to prevent damage to an invitee from unusual danger, by which is meant unusual from the point of view of the particular invitee concerned and unexpected by him in the particular circumstances in which he is availing himself of the invitation extended to him. If an invitee, acting reasonably and exercising due care for his own safety, does not appreciate the existence of the danger, or its nature, it will be to him an unusual danger.

ACTION.

The plaintiff, J. Horton, a man now seventy years of age, was a boiler maker and for the last thirty-four years had been an electric welder. The firm by which he was employed had a sub-contract with the defendants, London Graving Dock Co., Ld., to do certain welding work on the trawler *Valmont* which was lying in one of the wet docks of the East India Docks and was being reconverted into a fishing trawler by the defendants after being released from requisition as a naval vessel. The defendants were in occupation of the vessel but not of the dock, so that the shipbuilding regulations were not operative to impose any duties on them. The

1949

HORTON
v.
LONDON
GRAVING
DOCK
CO. LD.

plaintiff was engaged with other welders in welding strips of steel to the ribs of the trawler. For the purpose of enabling the welders to carry out their work the defendants provided a staging which consisted of four boards or deals about twenty feet long, eleven inches wide and three inches in depth. The boards rested on two angle irons and were placed, one eighteen inches from the port side of the trawler, the next about five feet from the first, the third about five feet from the second and the fourth about five feet from the third and about eighteen inches from the starboard side of the trawler. If the plaintiff or any of his fellow welders desired to cross from one deal to another they could only do so by stepping on the angle iron. The plaintiff had been working on the ship since August, 1946, and had been using the staging for about a month prior to December 16, 1946. On that day, the plaintiff in the course of his work, had been standing on one of the middle deals on the starboard side. He had temporarily finished his work and was in the act of handing a tool box to his fellow welder. The distance between the deal on which the plaintiff was standing and that on which his fellow welder was standing was about five feet. The plaintiff had one foot on the starboard middle deal and placed his other foot on the angle iron to enable him to hand over the tool box. He handed over the box and was trying to get both feet back on to the starboard deal when his foot on the angle iron, for some unexplained reason, slipped and he fell astride the angle iron and sustained the injuries in respect of which he brought the present action. The plaintiff returned to his work the next day and continued doing the same work as before the accident, until August, 1947, the staging being still in the same condition. He made no claim either for Workmen's Compensation payments or for damages until March 23, 1948. By his statement of claim the plaintiff alleged that the injury he sustained was caused by a breach of the duty which the defendants as invitors owed to him as an invitee.

Edgedale K.C. and *C. J. A. Doughty* for the plaintiff. The plaintiff here was clearly an invitee of the defendants, who accordingly owed to him the duty which an invitor owes to an invitee. In *Indermaur* v. *Dames* (1) the duty in the case of an invitee was expressed in the following terms by Willes J.: " With respect to such a visitor at least, we consider

---

(1) (1866) L. R. 1 C. P. 274.

"it settled law, that he, using reasonable care on his own "part for his own safety, is entitled to expect that the occupier "shall on his part use reasonable care to prevent damage "from unusual danger which he knows or ought to "know . . . ." The exact meaning of the duty there laid down is one which has vexed the courts for some years, and in Salmond on Torts, 10th ed., p. 479, which may be quoted as a work of authority, the learned author says: "The "foregoing passage" (from the judgment of Willes J.) "contains an unfortunate ambiguity. Is the duty of an "invitor to an invitee a duty to use care to make the premises "reasonably safe, or is it merely a duty to use care to ascertain "the existence of dangers and either to remove them or give "the invitee due warning of their existence?" Salmond says that on the authorities it is impossible to answer with confidence the question, whether it is the duty, e.g., of a shop keeper who invites the public into his shop, to use due care to provide a stairway reasonably safe for their use, or does he fulfil his whole duty to his customers by supplying a stairway which is visibly and obviously unsafe. (See also Charlesworth Law of Negligence, 2nd ed., p. 192.)

[LYNSKEY J. What does "unusual danger" as used by Willes J. in *Indermaur* v. *Dames* (1) mean?]

The expression is rather loosely used but it is submitted that any danger of the kind which existed in the present case and which is not usual on the premises is an unusual danger. A usual danger is one which would ordinarily be associated with particular premises, such for instance as a swing door, an unusual danger is one which a person does not normally expect to find on the premises. If the duty is that which is stated by Salmond and Charlesworth it is submitted that there was clearly a breach of it by the defendants. It is agreed that the authorities on the question are conflicting but reliance is placed on the modern view which is stated by Salmond as follows at p. 480: "In *Norman* v. *Great Western* "*Ry. Co.* (2) the Court of Appeal held that the occupier owed "to an invitee the duty of taking care to make the premises "reasonably safe, and not merely a duty to warn the invitee "that they were dangerous. And this is the way in which "the duty is now usually stated" (see also *Hyett* v. *Great Western Ry. Co.* (3), per Tucker L.J.; *Robert Addie and*

(1) (1886) L. R. 1 C. P. 274.

(2) [1915] 1 K. B. 584.

(3) [1948] 1 K. B. 345, 347.

Sons (*Collieries*) v. *Dumbreck* (1) per Lord Hailsham L.C., and *Haseldine* v. *Daw & Son Ltd.* (2) per Goddard L.J.). It is conceded that there are many dicta to be found which are in conflict with the above view but many of the dicta can be explained by considering what is meant by the "knowledge" of the danger (see *Fairman* v. *Perpetual Investment Building Society* (3), *Osborne* v. *London and North Western Ry. Co.* (4), *Letang* v. *Ottawa Electric Ry.* (5)). The submissions on behalf of the plaintiff may be summarized as follows: "The duty of an invitor to an invitee is to take due care to see that the premises to which the invitee is invited are reasonably safe. If the invitor fails in that duty, he is responsible for all damage which is the reasonable consequence of his breach of duty and it is no defence that the plaintiff had notice of the danger, unless the effect of his having had such notice was to give him a reasonable opportunity of avoiding the consequences of the danger. It is not giving a workman a reasonable opportunity of avoiding the consequences of the danger if the only way in which he can be sure of doing so is by giving up his work. Even if the invitee knows of the danger, it will remain an unusual one for him against which he is entitled to protection, unless it can be shown that, he freely and voluntarily and with a knowledge of the risk he was running, expressly or impliedly agreed to accept it.

Marven Everitt for the defendants. The defendants in this case are not liable. Their duty as invitors, as laid down by Willes J. in *Indermaur* v. *Dames* (6) was to prevent damage to the plaintiff from unusual danger. Such a danger means an unusual one from the point of view of the particular invitee concerned. What might be negligence on the part of an invitor in the case of a person who was not ordinarily employed on the premises, and who was a stranger to them, would not be so in the case of a person who was familiar with the premises. Here the plaintiff had been working for several weeks in this particular part of the vessel and had been using the staging which had been supplied by the defendants. There must be ignorance on the part of the invitee before any duty arises on the part of the invitor to give warning of possible danger, and in this case there was no ignorance on the part of the

(1) [1929] A. C. 358, 364.
(2) [1941] 2 K. B. 343, 355.
(3) [1923] A. C. 74.
(4) (1888) 21 Q. B. D. 220.
(5) [1926] A. C. 725.
(6) L. R. 1 C. P. 274.

plaintiff of any danger which there might be. He was fully aware of the nature and condition of the staging and in those circumstances the maxim volenti non fit injuria applies and he is not entitled to recover. (He referred to *Elliott* v. *Roberts* (1); *Hodgson* v. *British Arc Welding Co.* (2); *Anderson* v. *Guinness Trust* (3); *Kimber* v. *Gas Light & Coke Co.* (4).)

Edgedale K.C. in reply.

Cur. adv. vult.

June 2. LYNSKEY J. read a written judgment which after stating the facts continued: The plaintiff was clearly invited on to the trawler by the defendants and they owed to him the duty which an invitor owes to an invitee. The duty to an invitee is stated in that oft-quoted passage from the judgment of Willes J. in *Indermaur* v. *Dames* (5), and is: "That he using reasonable care on his part for his own safety, "is entitled to expect that the occupier shall on his part "use reasonable care to prevent damage from unusual danger "which he knows or ought to know; and that, where there "is evidence of neglect, the question whether such reasonable "care has been taken, by notice, lighting, guarding, or other-"wise, and whether there was contributory negligence in "the sufferer, must be determined by a jury as matter of "fact."

From this passage it seems clear that the only duty imposed on the invitor, or occupier, is to prevent damage from unusual danger. This, of course, raises the question of what is unusual danger. Is it danger unusual generally, or is it danger unusual in premises of the type, description and use, to which the invitation is extended, or is it a danger unusual from the point of view of the particular invitee, regard being had to the type, description and use of the premises to which he has been invited? In my view "unusual danger" means a danger unusual from the point of view of the particular invitee (see Phillimore L.J.'s judgment in *Norman* v. *Great Western Ry. Co.* (6)). It must be, from his point of view, unexpected in the particular circumstances in which he is availing himself of the invitation. It may be that other persons might expect such dangers, or might know of their existence in the premises upon which he goes, but if he, acting reasonably, and exercising due care for his own safety, did not appreciate the existence of the danger or its nature, or its extent, it would be to him an unusual danger.

---

(1) [1916] 2 K. B. 518.

(2) [1946] K. B. 302.

(3) [1949] 1 All E. R. 530.

(4) [1918] 1 K. B. 439, 445.

(5) L. R. 1 C. P. 274, 287 affd. (1867) L. R. 2 C. P. 311.

(6) [1915] 1 K. B. 584, 596.

On the contrary, if an invitee does appreciate the existence upon the premises to which he is invited of a danger and its nature and extent, it cannot be to him an unusual danger.

In the case before me the plaintiff was an experienced ship welder who, at the time of the accident, was sixty-seven years of age and had worked all his life as a ship's boiler maker or ship's welder. He had been employed on the *Valmont* from about August, 1946, and for more than a month had been welding in the fish house and had seen the staging provided. He had worked on that staging for some weeks before the accident and knew from experience that he had to use the angle irons if he desired to step from one deal to another, or from the ladder provided to a deal, or vice versa. He knew, if not by measurement at least by vision, the size of the deals, their distance apart, and the size of the angle-irons. Such risk as there was in using such angle-irons, with his experience was, in my view, obvious to him. Whatever might have been the position on the first day he worked on the staging, by the date of the accident the danger, such as it was, had become one of the usual dangers of his daily work and could not be regarded, so far as he was concerned, as an unusual one.

Counsel for the plaintiff contended before me that even although the plaintiff knew of the danger, it would remain to him an unusual one unless it could be shown that he, freely and voluntarily, with a full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it. In other words, unless a defence of volenti non fit injuria would succeed, the risk remained to the plaintiff an unusual one, and he cited *Letang* v. *Ottawa Electric Railway* (1) and other cases where the defence of volenti had been set up and failed, in support of his contention. It is enough, in my view, that the invitee appreciates the existence of the danger and its nature and extent, even although he did not freely and voluntarily, expressly or impliedly, agree to incur it. It was said before me that if a workman is put in the position of either having to incur the known risk or lose his

(1) [1926] A. C. 725.

work, he does not freely and voluntarily, expressly or impliedly, agree to incur it. That may or may not be true but in these days of trade unions and shop stewards I very much doubt if there are many cases where a workman would be placed in such a position. Even if he were, I do not think it would operate to extend the duty owed to him by an invitor. There was no evidence before me that the plaintiff would lose his employment if he refused to work on the staging provided. He never complained to his own foreman and, even after his accident, he worked upon the same staging without complaint either by himself or any of his fellow workers and he never suggested that his failure to complain was due to any fear of losing his work.

If it were necessary to decide it, I should have held on the facts of this case that the plaintiff did freely and voluntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran.

In the result I find that there was no breach of duty upon the part of the defendants to the plaintiff, and the plaintiff's claim, therefore, fails and there must be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiff: *Shaen, Roscoe & Co.*
Solicitors for the defendants: *Carpenters.*

P. B. D.

Distinguished. R. v. FURLONG. [1950] 1 All E.R. 636.

C. C. A.

REX *v.* NEAL.

1949
July 14, 25.

Lord Goddard C.J., Oliver and Stable JJ.

Criminal law—Trial—Irregularity in proceedings—Retirement of jury to consider verdict—Permission given to jury to go out to lunch—Verdict of guilty subsequently returned—Proceedings contrary to law—Conviction quashed—Venire de novo—Only to be awarded when trial a nullity from outset—Right of Crown to proceed on cases taken into account when sentence passed.

At a trial at quarter sessions, after the recorder had concluded his summing-up and the jury had been delivered to the bailiff for the purpose of considering their verdict, they sent a message to the recorder asking for permission to leave the court for the purpose of obtaining luncheon. The recorder gave the necessary permission. After the midday adjournment the jury returned a verdict of guilty on some of the counts in the indictment. The appellant appealed on the ground that the proceedings were irregular in law with the result that the conviction could not stand.

Held, that the allowing of the jury to leave the court and go into the town after they had been charged, thereby allowing them to leave the custody of the bailiff who had been sworn to keep them in some private and convenient place, was so serious an irregularity and departure from the procedure recognized by law that the court had no option but to quash the conviction.

Held also, that a venire de novo could not be awarded in the circumstances. That procedure was only applicable where there had been such a mis-trial as rendered the trial a nullity from the outset and that in the present case the trial could not be said to have been a nullity from the outset since the irregularity only occurred after all the evidence had been given and the summing-up concluded.

It was, however, open to the Crown to proceed on cases which had been taken into account when sentence was passed: *Rex* v. *Nicholson* (1947) 32 Cr. App. R. 127 followed.

Appeal against conviction.

The appellant, Frank Neal, was indicted at Nottingham City Quarter Sessions on charges of larceny and fraudulent conversion. At the trial, after the recorder had concluded his summing up and the jury had been given in charge of the bailiff for the purpose of considering their verdict, they sent a message to the recorder asking whether they might have lunch together during the midday adjournment, and for that purpose might have permission to leave the court. The recorder, after referring to Archbold's Criminal Pleading, 31st ed., p. 194, where it is stated that the jury must not leave the place appointed for their deliberations after they have retired, without the special permission of the court, gave the necessary permission. On returning to court, after the adjournment, the jury returned a verdict acquitting the appellant on all the charges of larceny and convicting him on eight charges of the misdemeanor of fraudulent conversion. The recorder then heard evidence of character and proceeded to judgment. The appellant appealed on the ground that the allowing of the jury to leave the court after they had retired to consider their verdict was contrary to law and that, consequently, the conviction should be quashed.

D. M. Cowley for the appellant. The trial judge had no power in law to permit the jury to separate after the charge had been delivered and they had been placed in the custody of the bailiff for the purpose of considering their verdict. The jury must remain in the charge of the bailiff until they have delivered their verdict without holding communication with any person: *Rex* v. *O'Connell and Others* (1). The passage in Archbold, Criminal Pleading and Practice, 31st ed., p. 194, on which the recorder relied, where it is stated that the jury may separate after retirement with the leave of the court, is unsupported by the authorities. *Rex* v. *Ketteridge* (2) is an authority for the quashing of a conviction on the ground that the jury had separated, but it may be argued that the case is distinguishable from the present because there the separation was due to the act of a single juryman without any leave from the court being given, whereas in the present case the separation was brought about by the act of the recorder, who misdirected himself as to his powers under the law. The words used in *Rex* v. *Ketteridge* (2) "it is, of "course, open to the Crown to recommence the proceedings" were obiter, and, further, are not in point in the present case. The action of the recorder was equivalent to a misdirection or to the admission of inadmissible evidence, and the conviction cannot stand.

[Lord Goddard C.J. What happened was an irregularity which may have rendered the trial abortive, but in such circumstances the court would have power to order a venire de novo.]

If further proceedings were taken on the charges before the court, which included both felonies and misdemeanors, the accused could successfully set up the defence of autrefois acquit or autrefois convict. The court in the present circumstances has no power to order a venire de novo. It cannot be awarded after a verdict on a charge of felony has been returned. It was stated in *Reg.* v. *Murphy* (3) that when the jury have once found a verdict of conviction or acquittal the matter has become res judicata and after that there can be no further trial. The present case can be distinguished from all those in which a venire de novo has been awarded, because in all those cases the trial had been a complete nullity from the outset, whereas here there was no irregularity until after all the evidence had been given and the summing-up completed. When a trial has been a nullity from the outset, the verdict of the jury is, in fact, no verdict and the accused was at no time in peril: see *Crane* v. *Director of Public Prosecutions* (1). In the present case there was a good indictment, evidence was properly given and received and a verdict given and the trial was in all respects a proper one save for the error with regard to the separation of the jury. That was a ground for quashing the conviction but did not render the trial such a nullity that a venire de novo could be awarded.

---

(1) (1845) 1 Cox C. C. 410.

(2) [1915] 1 K. B. 467, 471.

(3) (1869) L. R. 2 P. C. 535, 547, 548.

Nigel Robinson for the Crown. The conviction in the present case was on charges of fraudulent conversion, that is to say the charges were for misdemeanor, and the separation of the jury was with the consent of the court. In the case of a trial for a misdemeanor, it is submitted that the court has a discretion to allow the jury to separate in special circumstances: *Rex* v. *Ketteridge* (2) is explained in *Rex* v. *Twiss* (3). As to the power of the court to grant a venire de novo, it is clear from *Crane* v. *Director of Public Prosecutions* (1) that in such circumstances as those existing in the present case a venire de novo could properly be awarded.

Cur. adv. vult.

July 25. LORD GODDARD C.J. read the following judgment: The prisoner was charged before the Recorder of Nottingham on an indictment containing twenty-six counts, two of which were withdrawn from the jury. Of the remaining counts, some were for larceny of money and others for fraudulent conversion. The jury acquitted on all charges of larceny and convicted on eight charges of the misdemeanor of fraudulent conversion. The appeal is brought, not on any ground of misdirection or misreception of evidence and, in fact, the merits of the case do not enter into consideration at all, but it appears that after the summing-up was concluded and the jury given in charge of the bailiff, they sent a message to the recorder asking that they might be allowed to leave the court for the purpose of getting luncheon, and the recorder has reported to the court that what in fact happened was that after the jury had been absent for about half an hour a message was sent asking if the jury might have lunch together during the midday adjournment and leave the court for that purpose. He gave them permission to do so after referring to Archbold's Criminal Law, 31st ed., p. 194, where it is stated that the jury must not leave the place appointed for their deliberations after they have retired without the special permission of the court. He appears to have treated that as saying that he could give them permission to leave the court, and accordingly he did so. After the jury had given their verdict, Mr. Cowley who appeared for the prisoner, mentioned the matter to the recorder who said "I understand they did "disperse, I do not know what the period was, for the luncheon "interval." The recorder then heard evidence of character and proceeded to judgment. The point that is now taken on behalf of the prisoner is that the allowing the jury to leave the court after they had retired to consider their verdict was an irregularity which was contrary to the law and that, consequently, the conviction must be quashed.

---

(1) [1921] 2 A. C. 299, 328, 331.
(2) [1915] 1 K. B. 467.
(3) [1918] 2 K. B. 853, 858.

There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leaves the court no option but to quash the conviction (per Lord Sumner in *Crane* v. *Director of Public Prosecutions* (1)), and the question is whether or not this was an essential departure from well established rules of criminal procedure. Certainly, no member of this court has ever heard of a jury being allowed to leave the building or to depart from the custody of the bailiff once they have been enclosed for the purpose of considering their verdict. In fact, it is well known that to avoid juries being kept locked up without refreshment it is a common practice for the presiding judge to break off his summing-up, may be quite near to the end, to allow the jury to obtain their luncheon or other refreshment and afterwards to complete his charge, and there is no case to be found in the books where a jury once given in charge of the bailiff have been allowed to leave the building for any purpose whatever. It is laid down in Coke on Littleton, p. 227b, that a jury must not, until they are agreed, separate or leave the place appointed for their deliberations, though that must now be read in conjunction with cases which have decided that it is within the discretion of the court to discharge a jury who are unable to arrive at a verdict. Reference need only be made for this purpose to *Winsor* v. *Reg.* (1). Blackstone's Commentaries, vol. 4, p. 360, the edition of 1826 by Joseph Chitty, says "the jury cannot be discharged (unless in cases of evident "necessity) till they have given in their verdict." The matter was considered by this court in *Rex v. Ketteridge* (2). The court there decided that if a juror, after the judge has summed-up in any criminal trial separates himself from his colleagues and, not being under the control of the court converses, or is in a position to converse, with other persons, it is an irregularity which, in the opinion of the court, renders the whole proceedings abortive. We can see no reason why if this is the case where a single juror goes out so as not to be under the control of the court, and is in the position to converse with other persons, it could make any difference if the whole of the jury leave the court unattended. Indeed, it would appear to be an a fortiori case. It is unnecessary to consider what might be the position if the court permitted them to go to some place for refreshment under the charge of the bailiff. It may be that in such a case the position would be no different from that which obtained in murder cases until the recent legislation which permits a jury to separate for the night, because it is well known that when the court rose for the day, the jury were taken in the custody of the bailiff or bailiffs to an hotel where they stayed for the night and were brought back in the same custody to the court the next day. This might still happen if the court, in its discretion, refused to allow them to separate. In truth, the statement in Archbold is too wide and should be qualified by some such words as "to "be given only in cases of evident necessity." No doubt, if a juror is taken ill or wishes to relieve himself, the court can permit the bailiff to take him from the jury room for the purpose of medical attention or of going to the water closet but he must remain in the charge of the bailiff. If the illness is not a mere passing indisposition, the judge could no doubt discharge that particular juryman, as he could if he was taken ill in the box, and under the provisions of the recent statute could take a verdict provided the jury are not reduced below ten. Before that statute, if any one or more of the jury were taken ill and could not continue their deliberations without danger, the duty of the judge was to discharge the jury without giving a verdict and to order the trial to take

---

(1) [1921] 2 A. C. 328, 331.

---

(1) (1866) L. R. 1 Q. B. 289, 390.

(2) [1915] 1 K. B. 467.

C. C. A.
1949
Rex v. Neal.

place again. This is clear from the judgment of Blackburn J. in *Winsor* v. *Reg.* (1). In our opinion, in allowing the jury to leave the court and go into the town after they had been charged and thereby leaving the custody of the bailiff who had been sworn to keep them in some private and convenient place is so serious an irregularity and departure from the procedure recognized by law that we have no option but to quash the conviction, as was done in *Rex* v. *Ketteridge* (2).

It may also be observed that s. 35, sub-s. 4, of the Criminal Justice Act, 1948, reinforces the view which we have expressed because it is provided by that section that upon the trial of any person for an offence on indictment, the court may, if it thinks fit, at any time before the jury consider their verdict, permit them to separate. It may be said in this case that there was no evidence before the court that the jury did separate. They had asked if they might leave and have luncheon together, but whether they sat at one table or more than one, whether they went to the same place for luncheon or to different places, they ceased to be under the control of the court and were out of the custody of the bailiff, and that, in our opinion, constitutes the irregularity.

Before leaving this part of the case we desire to make an observation for the guidance of counsel should a similar case arise in the future. If some irregularity comes to the knowledge of counsel before the verdict is returned, he should bring it to the attention of the court at the earliest possible moment so that the presiding judge may consider whether or not to discharge the jury without giving a verdict. Points of this sort ought not to be held in reserve with a view to taking them before this court when it may be, as here, too late to remedy the mistake. In this connexion we call attention to the concluding passages of Lord Simon's speech in *Stirland* v. *Director of Public Prosecutions* (3).

In this case, the irregularity should have been mentioned to the recorder before the jury returned their verdict. But it seems clear that had this been done the result would have been the same. The recorder believed, after his reference to Archbold, that he had power to give permission to the jury to leave the court, and counsel had not, nor could it be expected that he would have, the authorities at hand to deal with such an exceptional situation. Accordingly, there is no reason to suppose that had he mentioned it before verdict, the recorder would have acted otherwise than he did. In these peculiar circumstances we are attaching no blame to counsel who was faced with a situation which might well have disconcerted the most experienced practitioner. We desire, however, to emphasize that if an irregularity arises in a trial which can be cured, and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction.

---

(1) L. R. 1 Q. B. 289.
(2) [1915] 1 K. B. 467.
(3) [1944] A. C. 328.

The point now arises whether the court, having quashed the conviction, should order an acquittal or make some other order under the special provisions of the Act, as was done in *Crane* v. *Director of Public Prosecutions* (1). The question is, then, has the court power to order a further trial by awarding a venire de novo? At first, when this matter was discussed the court inclined to the view that they could set aside the verdict and order a venire de novo. In *Rex* v. *Ketteridge* (2), the court said that the only course open to the court is to discharge the jury and to commence the proceedings afresh, and a few lines further down it was said: "It is, of course, "open to the Crown to recommence the proceedings." It will, however, be observed that the question whether the court had power to order a retrial had not been argued. No doubt, if it is brought to the attention of the court before the verdict is given that the jury have separated, the court should at once discharge them from giving a verdict and order the proceedings to begin de novo, but both in *Rex* v. *Ketteridge* (2) and in the present case, the verdict was delivered and recorded and judgment was given.

In our opinion, if it transpires that there has been a mis-trial, then whether the offence amounts to a felony or a misdemeanor the court can order the case to be retried, but, in order that it may be said that it is a mis-trial, the circumstances must be such as render the trial a nullity from the outset. In *Crane* v. *Director of Public Prosecutions* (1), which was a case of felony, the appellant was indicted for the offence of receiving stolen goods. There was a separate indictment against the thief. No doubt by some oversight, the two prisoners were given in charge of the same jury and were tried together, and both were convicted and sentenced. It seems that the clerk of the peace at the Leicester City Sessions, having the two indictments before him, arraigned the prisoners as though they were jointly indicted, and the fact that there were separate indictments was not brought to the attention of the recorder, or of the counsel in the case. The House of Lords held that the trial was a nullity and that there must be a fresh trial, and other cases can be found in the books in which this course has been taken both in cases of felony and of misdemeanor. Most of them will be found collected in the judgment of Blackburn J. in *Winsor* v. *Reg.* (1), from which it is clear that if there has been such an irregularity as would make the trial a nullity, or if the jury return a wholly imperfect verdict the court can direct a venire de novo even in the case of a felony. The law was much considered in *Reg.* v. *Murphy* (2) following on the case of *Reg.* v. *Bertrand* (3), and Sir William Erle in stating the advice which the Judicial Committee would tender to Her Majesty in *Reg.* v. *Murphy* (2) said: "The cases in which a verdict upon a charge of felony "has been held to be a nullity and a venire de novo awarded "have not been classified in the Digests; there are cases "of defect of jurisdiction in respect of time, place or person— "cases of verdicts so insufficiently expressed, or so ambiguous, "that a judgment could not be founded thereon; but we have "not discovered any valid authority for holding a verdict "of conviction or acquittal in a case of felony delivered by "a competent jury before a competent tribunal in due form "of law to be a nullity by reason of some conduct on the part "of the jury which the court considers unsatisfactory." We think that this applies not only to a charge of felony but also to one of misdemeanor. Moreover, whereas in this case the indictment charges both felonies and misdemeanors as it can under the Indictments Act of 1915 but could not before, it is quite clear that if a venire de novo were awarded the whole indictment would have to be tried over again, and so the charges of felony of which the prisoner was acquitted would have to be retried as well as the misdemeanors of which he was convicted. But that, in the opinion of the court, is not the governing consideration. This trial can not in any sense be said to have been a nullity because of an irregularity on the part of either judge or jury down to the time when all the evidence had been heard and the summing-up had taken place. Down to that point everything was regular and in order. We think a test of what would amount to a mis-trial sufficient to render the trial abortive and void would be whether the irregularity would be patent on the record if it were drawn up. If, for instance, the record in *Crane* v. *Director of Public Prosecutions* (1) had been drawn up it would have appeared that there were two indictments and not a joint indictment. Both indictments would have had to be set out, and yet one verdict was returned and one judgment delivered. So, too, if an indictment were preferred at quarter sessions which quarter sessions had no jurisdiction to try there would be a patent defect at once apparent on the record; the prisoner would never have been in peril of a lawful sentence being passed upon him, and there would, in fact, have been no trial. Or again, it might appear that only eleven jurors were empanelled, for when the record was drawn up in former days the names of all the jurors sworn appeared thereon. Another case which occurred not many years ago was one in which a recorder of a borough, on account of illness, had appointed a deputy to sit in his place and it afterwards appeared that the deputy had not the necessary qualification. The conviction, therefore, was coram non judice and the conviction was quashed and a venire de novo directed. That is an instance where the irregularity would not appear on the record. There are also several cases, most of which will be found referred to in *Winsor* v. *Reg.* (2), of verdicts so defective or ambiguous that no judgment could be founded thereon. In all this class of case the trial has been and could only be treated as a nullity, but it is impossible to hold that the reasoning on which those cases depend applies to the circumstances of the present. We think we are entitled to treat what the court said in *Rex* v. *Ketteridge* (3) as merely obiter. It will be observed that the court there did not order a venire de novo and, as we have already said, they expressed an opinion on a matter which had never been argued. We are, therefore, of opinion that we have no power to order a re-trial in this case and that all we can do is to quash the conviction.

---

(1) [1921] 2 A. C. 331.

(2) [1915] 1 K. B. 467.

---

(1) L. R. 1 Q. B. 289, 318, 319.

(2) L. R. 2 P. C. 535.

(3) (1866) L. R. 1 P. C. 520.

We point out that after verdict the prisoner asked that a large number of similar cases should be taken into consideration. It is, therefore, open to the Crown still to proceed against him, if so advised, in respect of those cases,

(1) [1921] 2 A. C. 331.
(2) L. R. 1 Q. B. 289.
(3) [1915] 1 K. B. 467.

because, since the decision of this court in *Rex* v. *Nicholson* (1), it is clear that autrefois convict cannot be pleaded where cases have been taken into consideration but the substantive conviction has afterwards been set aside. It was pointed out that taking offences into consideration was in no sense a conviction upon them. They were merely taken into consideration so as to prevent the prisoner being re-arrested and charged when he came out of prison from serving the sentence passed on the indictment. It may be that the court increases the sentence, but it still has to be one which the offence charged in the indictment would carry. It has been held in this court that a prisoner charged with the misdemeanor of attempting to break and enter, who asked for other offences, whether of breaking and entering or attempting to do so, should be taken into account, could not receive a sentence in excess of two years because the sentence must be one justified by the indictment on which judgment was passed. It is not for us to say whether the Crown should proceed. We only point out that they can do so if they choose.

In conclusion the court desires to express its indebtedness to Mr. Cowley for his careful argument, in the course of which he drew the attention of the court to the cases which enabled them to correct the first impression they had formed on reading the dicta of the court in *Rex* v. *Ketteridge* (2).

Appeal allowed, conviction quashed.

Solicitor for the appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the prosecution: *The Director of Public Prosecutions.*

---

(1) (1947) 32 Cr. App. R. 127. (2) [1915] 1 K. B. 467.

P. B. D.

CARR *v.* MERCANTILE PRODUCE CO. LD.

1949
July 20, 27.

Lord Goddard C.J., Oliver and Stable JJ.

Factory—Dangerous machinery—Duty to fence securely—Whether machine dangerous a question of degree and fact—Fact of accident occurring not conclusive—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1

In considering whether a machine, or a part of a machine, requires to be securely fenced in accordance with the provisions of s. 14, sub-s. 1, of the Factories Act, 1937, the court is entitled to, and must consider in the first place as a question of degree and fact on all the evidence in each particular case, whether the machine, or the part of it in question, is dangerous ; the fact that a machine is one capable of causing injury and that injury in fact happens to a person employed to work it, is not conclusive on the question.

Per Stable J. A machine does not necessarily cease to be securely fenced because by some act of perverted and deliberate ingenuity the guard can be forced or circumvented and the safeguards provided thereby rendered nugatory.

Higgins v. *Harrison* (1932) 25 B. W. C. C. 113, applied.

CASE stated by a metropolitan police magistrate.

The respondents, Mercantile Produce Co. Ld. were charged, as occupiers of a factory, with a contravention of s. 14, sub-s. 1 of the Factories Act, 1937, in that a certain dangerous part of a machine, namely, the worm of a macaroni extruding machine, was not securely fenced and that, in consequence of such contravention, the girl working the machine suffered injury. The machine in question consisted of a hopper into which the dough used in the manufacture of macaroni was fed by the person who attended the machine. The hopper consisted of two parts, the upper part being funnel-shaped, 6¼ inches deep and the lower part, 5 inches deep. In between the two parts was a circular metal plate situated 5 inches above the rotating worm, which was at the bottom of the lower half of the hopper. The metal plate consisted of two concentric rings, the diameter of the outer ring being 5 inches and that of the inner 1⅝ inches. It was possible for the fingers of the operator to pass through these spaces, but if a person working the machine only put his or her fingers through, they would not come in contact with the worm. It was only possible for fingers to touch the worm if the hand was also pushed through the space in the plate, an operation which was not altogether easy to accomplish. When the machine was in operation, dough from time to time would stick to the

1949

CARR
v.
MERCANTILE
PRODUCE
CO. LD.

side of the lower part of the hopper and, on the day of the accident, the injured girl put her hand through the metal plate, which was intended as a guard, for the purpose of dislodging some dough while the worm was rotating, with the result that the extreme tips of two of her fingers were caught by the rotating worm and cut off. She had been working the machine for five weeks before the accident and the machine had been used for three years without mishap and without complaint by any factory inspector, who had visited the factory since the machine had been installed. The magistrate held that the worm was not a dangerous part of the machinery and that the machine was securely fenced. He was further of opinion that the circumstances which occurred immediately before the accident were such as the injured employee should, or could, have reasonably expected to occur and that she did not act in a way in which any one operating the machine might reasonably be expected to act. He considered that it was unreasonable of the employee to attempt to dislodge the adherent dough with her fingers while the worm was rotating when she could, without difficulty, have switched off the motor, or have dislodged the dough with a stick or other implement. He also found that on other occasions the injured girl and other women employees had put their fingers through the open space of the plate to release dough adhering to the inside of the hopper, but there was no finding either that the respondents knew of this practice or that any accident had ever happened in consequence. He accordingly dismissed the information. The prosecutor appealed.

B. J. McKenna for the appellant.

Eric Sachs K.C. and *L. Pearl* for the respondents.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 27. LORD GODDARD C.J. read the following judgment. After stating the facts, the judgment continued: Mr. McKenna's argument on behalf of the appellant, in effect, was that in the present case the magistrate had no option but to find that this machine was dangerous. As I understood his submissions they were that if the machine was one capable of causing injury, and that injury did happen to a person who was employed to work on the machine and was injured while working, that was conclusive.

Mr. Sachs, on the other hand, for the respondents, contended that whether or not a machine or a part of the machine was dangerous within the meaning of the section was a question of fact, and that the question could not be resolved merely by showing that it was possible for an accident to happen and that one did in fact happen. In the course of a careful argument, he submitted that recent cases in this court have departed from the earlier principles which had been laid down to guide courts in coming to a conclusion whether a machine was dangerous or not, and that in every case the magistrate had to make up his mind on the whole of the evidence whether the machine was in fact dangerous, and that in each case it was a question of degree.

The first case on which he relied was *Hindle* v. *Birtwistle* (1). In that case, Wills J. said: "It seems to me that machinery "or parts of machinery is and are dangerous if in the ordinary "course of human affairs danger may be reasonably anticipated "from the use of them without protection. No doubt it "would be impossible to say that because an accident had "happened once therefore the machinery was dangerous. "On the other hand, it is equally out of the question to say "that machinery cannot be dangerous unless it is so in the "course of careful working. In considering whether machinery "is dangerous, the contingency of carelessness on the part "of the workman in charge of it, and the frequency with which "that contingency is likely to arise, are matters that must be "taken into consideration. It is entirely a question of "degree." R. S. Wright J., in concurring, also emphasized that it is a question of degree and of fact in all cases whether the tendency to fly out (it was a case of a flying shuttle) is a tendency to fly out often enough to satisfy a reasonable interpretation of the word "dangerous."

That case was expressly cited with approval in *Lauder* v. *Barr & Stroud* (2). The Court of Justiciary adopted exactly the same test, holding that it was a question of degree in each case: accordingly, the law was laid down in the same way on both sides of the border. du Parcq J. treated the matter in exactly the same way in *Walker* v. *Bletchley Flettons Ld.* (3), where he said that "a part of machinery is dangerous if it is "a possible cause of injury to anybody acting in a way in "which a human being may be reasonably expected to act

---

(1) [1897] 1 Q. B. 192, 195.
(2) 1927 S. C. (s) 21.
(3) [1937] 1 All E. R. 170, 175.

"in circumstances which may be reasonably expected to "occur," adding, "nobody expects human beings to be so "extravagantly careless as to touch some part of the machine "which it is not only not difficult to avoid, but which it is "actually difficult to get near," which seems to be very much the position in the present case. But that it is a question of fact is also clear from the decision of the Court of Appeal in *Higgins* v. *Harrison* (1), and this case is of particular value because it shows the considerations which a court should bear in mind, or at least some of them, when they have to decide when a machine is dangerous or not. The facts in *Higgins* v. *Harrison* (1), indeed, appear to me really to be indistinguishable from the present case. It was a case of a girl who put her hand into a machine while it was working. It is true that it was no part of her actual duty to do it. She had been told to clear up some capsules, which she thought meant to clear up any that she could find anywhere, and seeing some in a machine which was in motion, she put her hand into it and suffered injury. It is true that there is this distinction; in *Higgins* v. *Harrison* (1) case the girl was not employed to work on the machine, while in this case she was, but the girl was the servant of the employers and they owed a duty to her as an employee in a factory, and one of the duties that they owed was to fence dangerous parts of any machinery. Scrutton L.J. said: "The first question is, was the machine "dangerous? I have looked at the photographs; I have "considered the way in which the girl usually worked the "machine; I have considered the fact that on those four "machines there had been no accident for sixteen years, "although they were unfenced. I have considered the fact "that the inspector of the government had frequently seen "those machines and had never required them to be fenced, "and I have come to the conclusion, having the same opportunity of judging as the learned judge in the court below "had . . . . that that was not a dangerous machine. Of "course, it was dangerous if you went and put your hand "into it; every machine is dangerous if you go and put your "hand into it whilst it is working." Later on he said: "She "does not suggest that anybody told her to pick up that "particular thing; the suggestion is that 'Nobody told me "'not to.' Nobody told her not to go and stand on her head "in the middle of the machine, but it did not follow that, if

---

(1) (1932) 25 B. W. C. C. 113, 118.

"she did so, the employer would be liable for negligence "because he had not provided for that unexpected manœuvre." Greer L.J.'s judgment was to the same effect.

Now it is perfectly true that that judgment was given in a civil action and the case we are considering is a criminal prosecution, but where it is a case of the true construction of a section and of what in relation to a particular section it is necessary to prove to show a breach of the factory owner's obligations, in our opinion a judgment of the Court of Appeal is just as binding on this court, though we may be considering a criminal prosecution, as though we were trying a civil action. To hold otherwise would be to make a serious inroad on the rule of stare decisis on which so much of English jurisprudence depends.

A good illustration of the second line of case to which Mr. Sachs referred is *Sutherland* v. *Executors of James Mills Ld.* (1). I think that case could well be supported on the ground that the facts were so overwhelming that it was difficult to see how any court could come to a decision that the machine was not dangerous, but I am bound to say that I think some of the dicta in the case go beyond the decisions in the cases to which I have referred. Certainly, the court refused to take into account certain matters which were considered as of importance by the court in *Higgins* v. *Harrison* (2), as, for instance, that no complaint had ever been made by a factory inspector. Lord Hewart C.J., said: "nor ought it to be "necessary to point out that the burden is not shifted by the "Factory and Workshop Act upon the factory inspector," and there have, to my own knowledge, been other cases, not all reported, in which the learned Lord Chief Justice refused to consider the fact that no complaint had ever been made by the factory inspector. That fact is, of course, not conclusive. With all respect, it seems to be a point that ought to be taken into account, as indeed the Court of Appeal said in *Higgins* v. *Harrison* (2). After all, factory inspectors are not only trained experts but are wholly independent officials. Their duty is to inspect factories and the machinery therein to see, among other things, that machines are adequately fenced. The fact that they have passed a machine not only once, but on several occasions, without comment or requiring anything to be done, is at least some evidence that in the opinion of a duly qualified person no accident is reasonably likely to occur provided workpeople act in a way in which they may be reasonably expected to act.

---

(1) [1938] 1 All E. R. 283. (2) 25 B. W. C. C. 113, 118.

Chasteney v. *Michael Nairn & Co. Ld.* (1) was, again, a case in which there was no question but that the machine was dangerous to workmen greasing it, unless the machine was stopped. There was no sufficient fencing and the court held that merely to put up a notice saying that workmen were not to put their hands in the machinery while it is in motion, was no answer in a case where the machine was undoubtedly dangerous and no one could really contend otherwise. In our opinion, it is important that we should reaffirm in no uncertain terms that in each case the magistrate is entitled to, and must, decide in the first place whether the machine or part of it is dangerous and that is a question of degree and therefore of fact in every case. The magistrate, who obviously bestowed considerable care on the case and inspected the machine for himself, has, as the case shows, taken into account all the matters which *Higgins* v. *Harrison* (2) said ought to be taken into account. He has in no way misdirected himself nor considered matters which were immaterial or improper for arriving at a decision. To say, as Mr. McKenna was, I think, driven to say, that in these circumstances his decision was perverse is quite impossible. Indeed, I think I may say that were we to come to a contrary decision to that at which he has arrived, it might well be said that the perversity was ours and not his. I am content to say that in my opinion this is a question of degree and therefore of fact, that there was abundant evidence on which the magistrate could come to the conclusion at which he arrived, that he has not taken into account any facts which he ought not to have taken into account, and consequently that this appeal should be dismissed.

OLIVER J. I agree, and I feel that I cannot usefully add a word to the judgment which has just been delivered.

STABLE J. I have had the opportunity of reading the judgment of the Lord Chief Justice with which I am in entire agreement. I wish to add a few words only to remove an ambiguity, or possible ambiguity, in the findings of the magistrate. The passages in the magistrate's findings to which I refer are as follows: "(1.) I was of opinion that the "said machine was not a dangerous machine within the "meaning of the said Act. (2.) That the said machine was "securely fenced within the meaning of the said Act."

---

(1) [1937] 1 All E. R. 376.

(2) 25 B. W. C. C. 113.

The apparatus in question on the material date consisted of the hopper, the guard, and the rotating worm which my Lord has already described. As I understand it, the guard performed no function in the working of the machine and was there as a guard and nothing else.

Now it appears to me that these findings may mean, either, that even in the absence of the guard the worm was not dangerous or that the worm, situated as it was at the time of the accident, beneath the guard, was not a dangerous part of the machine for the reason that though without the guard it would have been dangerous, the guard rendered it innocuous or in other words that a dangerous part of the machine was securely fenced.

To avoid any possible ambiguity in future cases, in my judgment, the proper approach where there is a machine with a guard, is first, to inquire whether in the absence of the guard any part of the machine could properly be described as dangerous. If the answer is no, the adequacy or otherwise of the guard as a protection against a hypothetical but non-existent danger does not arise. It is only if the first question is answered in the affirmative that the second question arises, namely, was the dangerous part securely fenced in accordance with the Act.

In the present case, if the magistrate has held that the worm in the absence of the guard was not dangerous, without expressing any concluded opinion on the point, I might have had some difficulty in supporting this finding. I do not think, however, that he intended to hold more than this, that the apparatus with the guard provided was safe in every part or, in other words, that the dangerous part of the machine was securely fenced. If I am right in thinking that the latter is what he held, inasmuch as he applied, as my Lord has pointed out, the right tests and omitted none of the matters which he ought to have considered, for myself, I should have been slow to interfere with his finding of fact. However, if it is within my province sitting in this court to say so, I go further and wish to express my entire agreement with it.

In expressing the conclusions to which I have come, I do

1949

CARR
v.
MERCANTILE
PRODUCE
CO. LD.

Stable J.

not seek to detract in any way—even if it was within my power to do so, which it is not—from the expressions of opinion in this and other courts emphasizing the categorical nature of the duty and the high standard required.

The Factory Acts are there, not merely to protect the careful, the vigilant and the conscientious workman, but human nature being what it is, the careless, the indolent, the inadvertent, the weary, and even perhaps in some cases, the disobedient.

The duty, as has been said, is not to fence "somewhat "securely," but "securely," but there must be some limit placed on the word "securely," and a fence does not necessarily cease to be secure because by some act of perverted and deliberate ingenuity the guard can be forced or circumvented and the safeguards provided thereby rendered nugatory.

In conclusion, I should like to express my indebtedness to both counsel for the clarity and brevity with which the different aspects of this problem were presented.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, Ministry of Labour and National Service.*

Solicitors for the respondents: *Aukin, Courts & Co.*

P. B. D.

C. A.

1949

Feb. 24, 25,
Mar. 21.

Bucknill and Denning L.JJ. and Jenkins J.

METROPOLITAN BOROUGH AND TOWN CLERK OF LEWISHAM *v.* ROBERTS.

Landlord and tenant—Requisitioning—Ground floor of requisitioned house de-requisitioned—Freeholder enters into possession of ground floor and denies access to upper (requisitioned) floor—Application by town clerk to Ministry of Health to re-requisition ground floor so as to render freeholder a licensee and obtain control of access—Town clerk delegated to re-requisition—Authority granted by official of Ministry of Health—No evidence of personal instruction by minister to official—Notice of requisition posted on porch of occupied house without actual entry—Right to town clerk to sue for statutory possession—Whether requisition delegated, intra vires—Whether it appeared necessary or expedient to take possession for housing accommodation.

After the defendant, the owner of a house of two floors, which had been requisitioned in 1941, for persons rendered homeless by enemy action, had made repeated requests for possession of his house, the town clerk in June, 1946, released from requisition the ground floor of the house, leaving the first floor still requisitioned. The defendant entered into possession of the ground floor of his own house, but refused and continued to refuse all access to the upper requisitioned floor. The town clerk applied to the Ministry of Health for special authority to re-requisition the whole of the house, so that the owner might be permitted to occupy the ground floor as a licensee, and precautions taken to reserve right of access to the upper portion. G., a general inspector of the Ministry on November 12, 1946, wrote to the town clerk, in reply a letter headed, "The Ministry of Health," with the address of the Regional Office of the Ministry, stating that he was directed by the minister to say that he delegated to the town clerk his functions under reg. 51 of the Defence (General) Regulations, 1939, for the purpose of requisitioning the whole of the house for re-housing purposes. On November 22, 1946, the town clerk issued a notice requisitioning the whole house and served it by fixing on the porch of the house in the presence of the defendant's wife a copy of the notice addressed to the occupier, owner or whom it might concern, but he did not enter the house. The defendant did not sign the form of notice sent to him giving him leave to occupy the ground floor of the house as a licensee and continued to refuse access to the upper floor of the house. On December 4, 1947, the town clerk terminated the licence given to the defendant to occupy the lower floor and required the defendant to give him possession thereof within fourteen days. The defendant continued in possession.

The town clerk claimed possession of the premises in the county court. At the hearing G. gave evidence from which it appeared that no precise instructions were ever given to him as to the scope of his powers in general or in relation to the requisitioning of property in particular. There was no evidence that the Minister of Health had personally instructed G. to act in matters of this kind. The county court judge made an order for possession and the defendant appealed.

The defendant contended: (1.) That the town clerk was not authorized to re-requisition the house, because his only authority was derived from a letter from G., an official in the Ministry of Health, delegating the power of re-requisitioning the whole house, who could point to no authority from the minister himself; (2.) that the only power given by reg. 51 was to take possession of the house and that this had not been done, since the town clerk merely affixed the notice to the porch of the house and did not enter upon the premises or otherwise take possession of them. Accordingly the town clerk had no title to sue; (3.) that the action should have been brought in the name of the minister; and (4.) that the re-requisitioning of the house was not within the powers conferred on the executive by Parliament.

Held, that the delegation of power to re-requisition the house on November 12 if it were intra vires was valid. By virtue of s. 7 of the Emergency Powers (Defence) Act, 1939, the document of

November 12 must be deemed to have been made or issued by the Minister of Health "until the contrary" was proved by the defendant. The defendant had not proved the contrary, since the minister was entitled to act by an authorized official of his department and there was no necessity that it should be shown that the minister had given his mind to the matter personally. No question of delegation arose as between the minister and G. so that the maxim, delegatus non potest delegare, did not arise. *Carlish* v. *East Ham Corporation* [1948] 2 K. B. 380 approved and *Carltona Ld.* v. *Commissioner of Works* [1943] 2 All E. R. 560 followed.

Held also, that the delegation was an administrative and not a legislative act.

Per Denning L.J.: I cannot agree with the observations of Scott L.J. in *Blackpool Corporation* v. *Locker* [1948] 1 K. B. 349, 367–9, 377 that the delegation of the Ministry's powers in that case were "sub-delegated legislation"—observations which were, I think obiter.

Per Jenkins J.: Scott L.J. was not in that case dealing with a specific power to requisition one dwelling-house, but with the Minister's general delegation of his power of requisition to local authorities by means of circulars. Even were this delegation, contrary to his opinion, a legislative act, there was no reason why that function could not be performed through the appropriate departmental official.

Held also, that though the town clerk had merely posted the notice on the porch of the house and not entered upon the premises, he had power to sue: *James Macara Ld.* v. *Barclay* [1945] K. B. 148 followed. But, *per* Denning L.J. The power to requisition was merely to take possession of the land. It did not give any estate or interest in the land. The posting up of a notice: "I have this day taken possession," without actual entry, might operate to transfer possession to the Crown in the case of an empty house, but when a house was occupied, then, at any rate since the amended reg. 85 was introduced in February, 1946, that did not operate to transfer possession. In this case, neither the Crown, nor any agent took possession of the house. But a notice of requisition was not a nullity, even though actual possession had not been taken: once posted on the door, it operated as a direction to the occupier to give possession and an action in aid of the statutory power to take possession would lie.

Held also, that the action could be brought in the name of any agent or sub-agent who had been authorized to take possession on behalf of the Crown.

Lewisham Borough Council v. *Maloney* [1948] 1 K. B. 50, followed.

Held also, by Bucknill L.J. and Jenkins J., Denning L.J. dissenting, that the requisition delegated was within the powers conferred on the executive by Parliament.

Per Denning L.J. The power to requisition to-day was only given in respect of supplies and services which were essential to the well-being of the community. See reg. 51 and s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945. The power could be exercised if it appeared to the competent authority to be necessary or expedient to take possession for the purpose of so maintaining the supply of housing accommodation —no doubt an essential supply—as to secure a sufficiency of it. On November 22, 1946, the town clerk did not deem it necessary or expedient to take possession of the ground floor for that purpose. It was not his intention to take possession of it, but to get a legal right to the possession and to treat the defendant as a licensee, without taking possession himself. His intention, in effect, was to acquire a legal estate such as would for the time being override the freehold.

APPEAL from the Lambeth county court.

The defendant was the owner of a dwelling-house, No. 24 Boveney Road, Forest Hill, London, a six-roomed house designed with two floors for one household. In 1941, he took his furniture out of the house and moved to Leicester for business reasons, leaving the house empty. On July 3, 1941, the town clerk of Lewisham, under powers delegated to him by the Minister of Health under reg. 51 of the Defence Regulations, 1939, validly requisitioned the house and took possession of it for the accommodation of persons rendered homeless through enemy action. From September, 1944, to May, 1946, the defendant sought by application to the Ministry of Health and to the borough council of Lewisham to obtain possession of his own house for his own occupation. He was unsuccessful. He was offered alternative accommodation, but refused it as unsuitable. The council said that it was impossible, in view of the housing situation in Lewisham, to meet the defendant's request. Before June 24, 1946, the corporation supplied cooking apparatus to one room, and on that date the town clerk by notice released from requisition the ground floor of the house—"the lower flat, "24 Boveney Road." The minister's consent had been given to the town clerk for the de-requisition "on the understanding "that the release will not affect access to the remainder of "the premises still under requisition"; but the town clerk did not make this stipulation expressly to the defendant.

On July 8, 1946, the defendant entered into possession of the ground floor of his house. The upper floor, still requisitioned, was then unoccupied and the defendant put some of his furniture in it. He then changed the lock of the front door to prevent prospective occupiers of the upper floor from coming into the house in his absence, and his solicitors wrote to the town clerk that the de-requisitioning of the ground floor deprived an occupier of the upper floor of the house of the use of the hall and garden or any access thereto through the ground-floor premises. They also pointed out that the only lavatory and bathroom were on the upper floor, still requisitioned; and that the hot water system in the bathroom was served by a boiler in the kitchen on the ground floor, de-requisitioned, the fuel for which was provided by the defendant. The solicitors stated that they had advised the defendant that the upper floor of the house could not be used by another family without a trespass being committed over the de-requisitioned part of the house.

The town clerk on November 7, 1946, applied for the Ministry's special authority to re-requisition the whole of No. 24 Boveney Road, so that the owner might be permitted to occupy the lower floor as licensee and proper precautions might be taken to reserve right of access to the upper portion and to the garden for occupiers of the upper floor and to provide for the sharing of the bathroom and lavatory.

By a letter dated November 12, 1946, headed: "The "Ministry of Health" with the address of the regional officer of the Ministry, Mr. J. O'Gara, a general inspector of the Ministry of Health, wrote to the town clerk: "I am directed "by the Minister of Health to refer to your letter of the 7th "inst., and to say that in the circumstances he hereby "delegates to you as town clerk his functions under reg. 51 "of the Defence (General) Regulations, 1939, for the purposes "of requisitioning the whole of the above-mentioned premises, "(No. 24 Boveney Road), for re-housing purposes, and consent "is hereby given to such requisitioning."

On November 22, 1946, the town clerk, with the authority of the Ministry, issued a notice requisitioning No. 24 Boveney Road and served it by fixing on the porch of the front door of the house, in the presence of the defendant's wife, a copy of the notice addressed to the occupier, owner or whom it might concern, but he did not enter the house. The town clerk also sent a copy of the notice to the defendant's solicitors. On June 28, 1947, the town clerk wrote to the defendant's solicitors that, if the defendant continued to refuse to allow the council access to the upper floor of the house, he would have no alternative but to take steps to recover possession of the lower floor. He enclosed the usual form of licence to occupy the lower floor, for signature by the defendant and his wife. They did not sign the licence and on December 4, 1947, the town clerk wrote to the defendant's solicitors terminating the licence to occupy the lower floor and requiring the defendant to give up possession within fourteen days. The defendant did not leave the house and the council claimed possession of the premises in the Lambeth county court. At the hearing Mr. O'Gara gave evidence. It was contended for the defendant that according to Mr. O'Gara's evidence there had been no actual delegation of authority to Mr. O'Gara, and that he had, in fact, been acting without authority; and that the purported delegation of November 12, 1946, by the Minister to the town clerk was, therefore, bad in law. There was no evidence that the Minister of Health had personally instructed Mr. O'Gara to act in matters of this kind.

His Honour judge Collingwood said that it was clear that no precise instructions were ever given to Mr. O'Gara as to the scope of his powers in general or in relation to the requisitioning of property in particular. But the judge held that the presumption was that ministerial acts would be performed, not by the minister in person, but by responsible officials in his department. The judge relied on the judgment of Lord Greene M.R. in *Carltona Ld.* v. *Commissioner of Works* (1). Accordingly he made an order for possession and for payment by the defendant of 25*l.* 7*s.* 0*d.* rent and mesne profits.

The defendant appealed.

D. P. Croom-Johnson for the defendant. Mr. O'Gara's letter of November 12, 1946, purporting to delegate to the town clerk the minister's functions under reg. 51 of the Defence Regulations to re-requisition No. 24 Boveney Road was bad in law, since it is clear from Mr. O'Gara's evidence that he had no proper lawful authority from the minister to make this delegation. It is clear that the issue of this requisition had never been considered by the minister at all and he had never dealt with the matter himself. If the delegation was invalid, so was the requisition. If s. 7 of the Emergency Powers (Defence) Act, 1939 (2), does raise a presumption that the letter of November 12, signed by Mr. O'Gara was issued by the Minister of Health, that was so only until the contrary was proved: the contrary was proved by the evidence of Mr. O'Gara. Further, if Mr. O'Gara is to have been taken to have been delegated to make this requisition, he cannot sub-delegate that power to the town clerk. Delegatus non potest delegare. See *Allingham and Another* v. *Minister of Agriculture and Fisheries* (1). The delegation which purported to have been effected by the letter of November 12, 1946, was a legislative act and, as such, could only be validly done by the minister personally. See the judgment of Scott L.J. in *Blackpool Corporation* v. *Locker* (2).

---

(1) [1943] 2 All E. R. 560.

(2) By s. 7 of the Emergency Powers (Defence) Act, 1939: "Every document purporting to "be an instrument made or "issued by any Minister or other

If it is assumed that the delegation of November 12, 1946, was valid, the requisition was not within the powers conferred on the executive by Parliament. The power here was delegated solely for the purposes set out in the town clerk's letter of November 7, 1946, to the Ministry to re-requisition the whole of the house, so that the owner might be permitted to occupy the lower floor as a licensee and so precaution taken to obtain access to the upper floor of the house. That purpose was not for the purpose of maintaining the supply of housing accommodation, no doubt, an essential supply. See s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945. It could not have appeared to the competent authority to be necessary or expedient to take possession of the ground floor of the house. The competent authority did not want possession of the ground floor, but proposed to leave Mr. Roberts in possession of it as a licensee, but, without any power he might have as a freeholder to prevent access to the upper floor of the house. If the intention of the town clerk had been to obtain possession of the house, it could only have been effected by directing

"authority or person in pursuance "of any provision contained in, "or having effect under, Defence "Regulations, and to be signed "by or on behalf of the said "Minister, authority or person, "shall be received in evidence, "and shall, until the contrary "is proved, be deemed to be an "instrument made or issued by "that Minister, authority or "person; and prima facie evidence of any such instrument "as aforesaid may, in any legal "proceedings (including arbitrations), be given by the "production of a document "purporting to be certified to "be a true copy of the instrument "by, or on behalf of, the Minister "or other authority or person "having power to make or issue "the instrument."

(1) [1948] 1 All E. R. 780.

(2) [1948] 1 K. B. 349.

C. A.

1949

Metropolitan Borough and Town Clerk of Lewisham v. Roberts.

Mr. Roberts to give up his occupation and, if necessary, by turning him out. The real object of the re-requisition of November 22, 1946, was to bring pressure to bear on the defendant. The delegation, therefore, was not for the purposes set out in the regulation and the Act of 1945 and was invalid.

Further there could be no valid requisition without the prior or contemporaneous taking of physical possession of the house. The town clerk never took possession of the house, but merely served a notice of requisition on the defendant, who was in possession of the house, by posting it on the porch of the house. The town clerk, therefore, had no power to sue. It may be that on this issue the Court of Appeal is bound by *James Macara Ld.* v. *Barclay* (1). In no case was it for the town clerk or the borough council to sue: the only plaintiff could be the Minister of Health.

H. L. Parker and *Colin Pearson* for the plaintiffs. Mr. O'Gara had authority to write the letter of November 12, 1946, delegating to the town clerk his function under reg. 51 of the Defence Regulations to re-requisition this house: *Carltona Ld.* v. *Commissioner of Works* (2). It is plain that the minister cannot act personally in every case: he must act through the officials duly appointed to his department. The position is the same whether this was an administrative or a legislative act. No discretion to requisition was given: it was an ad hoc delegation to requisition this particular house or more particularly, the upper floor being already requisitioned, the lower floor. The town clerk did no more than requisition this particular floor on behalf of the minister. The observations of Scott L.J. in *Blackpool Corporation* v. *Locker* (3) are not in point here, since the court in that case had to consider the effect of a general delegation to local authorities of the minister's power of requisitioning effected by circulars containing a code of regulations. In fact, here, the delegation was an administrative act. The authority of the Minister of Transport for the delegation was duly proved. See s. 7 of the Emergency Powers (Defence) Act, 1939.

The requisition was within the powers conferred on the executive by Parliament. The delegation by the letter of November 12 is not confined by the terms of the letter from the town clerk to the Ministry of November 7. The letter of November 12 refers to the letter of the 7th inst., and states

(1) [1945] K. B. 148.

(2) [1943] 2 All E. R. 560.

(3) [1948] 1 K. B. 349.

merely that in the circumstances the minister "delegates "to you as town clerk his functions under reg. 51 . . . . for "the purposes of requisitioning the whole of the above-"mentioned premises . . . . for re-housing purposes." That was the purpose of the letter—"for re-housing purposes." This was a way and it might well be the only way in which the upper floor of No. 24 Boveney Road could be utilized for re-housing purposes. Whatever the town clerk asked for, that which he received was a delegation to requisition the house for re-housing purposes. The town clerk's letter of November 7, 1946, merely gave the reasons why the power to requisition was required.

The service of the notice of requisition on the defendant without actual possession being taken by the requisitioning authority created an immediate interest in possession on that authority and was an effective exercise of the power conferred on the authority by reg. 51: *James Macara Ld.* v. *Barclay* (1). [Regulation 85 of the Defence (General) Regulations 1939, was referred to.] The action can be brought in the name of any agent or sub-agent who has been authorized to take possession on behalf of the Crown. See reg. 51 (2.) (*a*) of the Defence (General) Regulations, and *Lewisham Borough Council* v. *Maloney* (2).

D. P. Croom-Johnson replied.

Cur. adv. vult.

March 21. BUCKNILL L.J. The main point argued on behalf of the defendant on this appeal and before the trial judge was that Mr. O'Gara had no authority to act on behalf of the minister. Mr. O'Gara was called as a witness at the trial and it was contended on behalf of the defendant that the evidence given by Mr. O'Gara showed that there had been no actual delegation of authority to him, and that he had been in fact acting without authority in the matter, and that the purported delegation of November 12, 1946, by the Minister of Health to the town clerk was therefore bad in law. The learned judge, when dealing with this point, said that it was clear that no precise instructions were ever given to Mr. O'Gara as to the scope of his powers in general or in relation to the requisitioning of property in particular. After citing from

(1) [1945] K. B. 148.

(2) [1948] 1 K. B. 50.

the judgment of Lord Greene M.R. in *Carltona Ld.* v. *Commissioners of Works* (1), the learned judge continued: "Applying these considerations to the present case, I am unable "to say that the evidence shows that Mr. O'Gara in purporting "to sanction on behalf of the minister the requisitioning "of property, and in particular in issuing the document "of November 12, 1946, was acting without authority to do "so. On the contrary, the presumption being that ministerial "acts will be performed, not by the minister in person, but "by responsible officials in his department, I think that where "such acts of an official nature, all of them involving the "knowledge and some of them requiring and receiving the "concurrence of other officials have, as here, continued over "a long period, this of itself affords cogent evidence that the "person in fact acting in such an official capacity was duly "authorized to act."

If Mr. O'Gara had not been called as a witness by the plaintiffs they could have relied on s. 7 of the Emergency Powers (Defence) Act, 1939. The plaintiffs could have successfully contended that that section relieved them of the burden of proving that the Minister of Health personally decided that the ground floor of number 24 should be requisitioned again. This appears from the case of *Carlish* v. *East Ham Corporation* (2).

In *Carltona Ld.* v. *Commissioners of Works* (1), a notice signed on behalf of the Commissioners of Works was sent to the owners of a factory, stating that the commissioners were taking possession of the premises, under reg. 51 (1.) of the Defence Regulations. The notice was signed by a Mr. Morse for and on behalf of the commissioners, and was written on the headed letter paper of the Ministry of Works and Planning, and was in the following terms: "I have to "inform you that the department have come to the conclusion "that it is essential, in the national interest, to take possession "of the above premises." The owners of the factory argued before the Court of Appeal, that the requisition was bad because the persons constituting the requisitioning authority never brought their minds to bear on the question. Lord Greene M.R. in the course of his judgment said that in his opinion there was no substance in the argument that the First Commissioner did not personally direct his mind to the matter. He said (3): "In the administration of government

(1) [1943] 2 All E. R. 560.

(2) [1948] 2 K. B. 380.

(3) [1943] 2 All E. R. 560, 563.

"in this country the functions which are given to ministers "(and constitutionally properly given to ministers because "they are constitutionally responsible) are functions so "multifarious that no minister could ever personally attend "to them. To take the example of the present case, no doubt "there have been thousands of requisitions in this country "by individual ministries. It cannot be supposed that this "regulation meant that, in each case, the minister in person "should direct his mind to the matter. The duties imposed "upon ministers and the powers given to ministers are normally "exercised under the authority of the ministers by responsible "officials of the department. Public business could not "be carried on if that were not the case. Constitutionally, "the decision of such an official is, of course, the decision "of the minister. The minister is responsible. It is he "who must answer before Parliament for anything that his "officials have done under his authority, and, if for an "important matter he selected an official of such junior "standing that he could not be expected competently to "perform the work, the minister would have to answer for "that in Parliament. The whole system of departmental "organization and administration is based on the view that "ministers, being responsible to Parliament, will see that "important duties are committed to experienced officials. "If they do not do that, Parliament is the place where "complaint must be made against them. In the present case "the assistant secretary, a high official of the Ministry, was "the person entrusted with the work of looking after this "particular matter, and the question therefore is, relating "those facts to the argument with which I am dealing, did "he direct his mind to the matters to which he was bound "to direct it in order to act properly under the regulation ?"

In my opinion the finding of the judge on this point is a finding of fact which may properly be inferred from the evidence placed before him at the trial. Mr. O'Gara was a public official in the employment of the Crown, and was the man in the Ministry of Health who had the task given to him by the responsible authority of examining questions of ad hoc requisitions of property in a particular district, and of making decisions thereon. It is true that there is no evidence that the Minister of Health personally told Mr. O'Gara to act on his behalf in matters of this kind. Such a suggestion seems to be unreasonable. The question of appointment ultimately rests with the minister, as also does the question of dismissal, subject in each case to the intervention of Parliament, but in practice the appointment of the responsible official is made by the minister through the secretarial department of the Ministry. The question whether in this case the minister, acting through Mr. O'Gara, lawfully delegated his powers of requisitioning the ground floor of this house to the town clerk must be considered in the light of the particular circumstances of this case. In this case no discretion was left to the town clerk whether he should again requisition the ground floor or not. All the facts were placed before the minister, and under the special circumstances he delegated his powers to requisition the property to the town clerk. If the minister decided to requisition the property himself, I do not think that he would have been doing anything unconstitutional or high-handed by authorizing the town clerk to act on his behalf, and I cannot myself see any material difference between such a course and the course which was actually taken of delegating to the town clerk the power of requisition which the minister undoubtedly had.

It was argued that the delegation by the minister of this power to the town clerk was a legislative act, and that such delegation could only be performed by the minister himself. I understand this to mean that if the minister had expressed his personal approval of the letter written by Mr. O'Gara, that would have made it a valid delegation, but the absence of any such ministerial approval made the delegation unlawful. I do not agree with this proposition, which does not seem to have any clear legal authority. So to hold would seem to make unreasonable difficulties in the administration of a very urgent problem, the requisition of houses owing to the scarcity of housing accommodation caused by war damage. It seems to me to draw an artificial distinction between the procedure to be followed in the case of the requisition of a house by the minister, which I think could be done by Mr. O'Gara under the general departmental practice, such as is described by Lord Greene M.R., and on the other hand, a delegation of the minister's powers to the local authority for the same purpose, which he can also lawfully do under reg. 51 (5.).

Mr. Croom-Johnson also took the point that the power to requisition was not effectively exercised by the town clerk because he did not actually enter the house, but merely

C. A.

1949

Metropolitan Borough and Town Clerk of Lewisham *v.* Roberts.

Bucknill L.J.

affixed the notice in the porch. Mr. Croom-Johnson conceded that this court is bound by the decision, adverse to his contention, of the Court of Appeal in *James Macara Ld.* v. *Barclay* (1), and I therefore need say no more on that point.

His last point was that the proper plaintiff in the action should have been the Minister of Health, and not the town clerk or the corporation. This point is, I think, covered by the terms of reg. 51 (2.) (*a*) which authorizes the competent authority to do or authorize persons using the land to do in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest. The minister delegated his powers, which included those under this sub-section, to the town clerk, and the town clerk or the corporation on his behalf had, in my view, authority to bring the action. The point is covered by the decision of the Court of Appeal in *Lewisham Borough Council* v. *Maloney* (2). For these reasons I would dismiss the appeal.

Since writing this judgment I have had the opportunity of reading the judgments of Denning L.J., and of Jenkins J., on the point on which Denning L.J. considers that the appeal should be allowed. I agree with the judgment of the trial judge on this point. I am unable to see that the Ministry mistook their powers. The procedure adopted by the town clerk on the authority of the Ministry seems to me to have been reasonable under the circumstances. In my opinion it is the defendant who has behaved unreasonably because he has deliberately prevented the local authority from exercising those powers to which he had consented as a condition of his regaining possession of the ground floor of his house. The action which the Ministry took seems to me to have been the only effective and reasonable way of solving the problem created by the defendant's attitude about his house.

Denning L.J. In this case the town clerk of Lewisham claims possession of a house from Mr. Roberts, who is the freeholder, and is living there himself with his wife. The town clerk bases his claim upon a regulation, which was brought into force at the beginning of the war, empowering the executive to requisition property for the efficient prosecution of the war. Since the war, however, the regulation has been continued for the purpose of maintaining, controlling and

(1) [1945] K. B. 148.

(2) [1948] 1 K. B. 50.

regulating the supply of housing accommodation. This case raises the important question: How far does this regulation in the post-war period enable the executive to turn a man out of his home?

Before I deal with this question, I must deal with a number of points raised on behalf of Mr. Roberts contending that the procedure was out of order. The right to requisition is, of course, not a right which belongs to any private individual or even to any local authority. It is a power which Parliament has conferred on the Crown, that is to say, on the Executive acting by the government departments. Whenever anyone requisitions property he must be duly authorized to act on behalf of His Majesty, see s. 1, sub-s. 2 (*b*) (i) of the Emergency Powers (Defence) Act, 1939, and s. 1, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939. *Minister of Health* v. *Bellotti* (1), and *Progress Building Ld.* v. *Westminster City Corporation* (2).

The first point taken here was that the town clerk was not authorized to requisition this house because his only authority was derived from a letter from an official in the Ministry of Health who could point to no authority from the minister himself. Now I take it to be quite plain that when a minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government: see *Carltona Ld.* v. *Commissioner of Works* (3), and an article by Professor Willis in 21, Canadian Bar Review, at p. 257. When, therefore, a government department requisitions property itself under reg. 51 (1.), it is not necessary for the minister himself to consider the matter. It is sufficient if one of the officials of that department brings his mind to bear on the propriety of it. When the government department delegates its functions to a town clerk under reg. 51 (5.), it is really only putting someone in its place to do the acts which it is authorized to do. The town clerk is, so to speak, an agent of the department, and a sub-agent of the Crown. The delegation to the town clerk is simply administrative machinery so as to enable the administrative function of requisitioning to operate smoothly and efficiently; and, like all administrative functions,

---

(1) [1944] K. B. 298.
(2) [1947] 1 All E. R. 684.
(3) [1943] 2 All E. R. 560.

C. A.
1949
Metropolitan Borough and Town Clerk of Lewisham
v.
Roberts.
Denning L.J.

the act of delegating can be exercised by any authorized official of the government department. The delegation, whether general or specific, is not a legislative act, but an administrative one (see the principles stated in *R.* v. *Burah* (1); *Hampton* v. *United States* (2); and *King-Emperor* v. *Benoari Lal Sarma* (3)); and it does not divest the government department of its powers (see *Huth* v. *Clarke* (4), and *Gordon Dadds* v. *Morris* (5)). Having regard to those authorities, I cannot agree with the observations of Scott L.J. to the contrary in *Blackpool Corporation* v. *Locker* (6). They were, I think, unnecessary for the decision, which turned on the fact that the town clerk there acted outside his actual authority and his action could not be ratified. The first point taken on behalf of Mr. Roberts therefore fails.

The second point was that the only power given by reg. 51 was to take possession, and that as that had not been done here, the town clerk had no title to sue. In order to consider this point it is necessary to consider the nature of the power to requisition land. It is only a power to take possession of land. It is not a power to acquire any estate or interest in any land. (See s. 1, sub-s. 2 (*b*) (i), of the Emergency Powers (Defence) Act, 1939, and ss. 1 and 2 of the Compensation (Defence) Act, 1939.) Once possession is taken the Crown can exercise all the powers incident to possession, such as to licence other people to use the premises (see *Southgate Borough Council* v. *Watson* (7)); but it cannot grant a lease, or create any legal interest in the land in favour of any other person, because it has itself no estate in the land out of which to carve any interest. Once possession is taken, the Crown, of course, has all the rights incident to possession and may by itself or its agents or sub-agents exercise all the possessory remedies. A government department, or a town clerk or a local authority, who is in possession on behalf of the Crown may, therefore, like a bailiff, bring an action of trespass against anyone who disturbs that possession: *Erith Corporation* v. *Holder* (8); and the fact of being in possession is good as against purchasers, without being registered on the Land

---

(1) (1878) 3 App. Cas. 889, 905–6.

(2) (1928) 276 U. S. 394, 407.

(3) [1945] A. C. 14, 24.

(4) (1890) 25 Q. B. D. 391.

(5) [1945] 2 All E. R. 616, 621.

(6) [1948] 1 K. B. 349, 367–9, 377.

(7) [1944] K. B. 541.

(8) Ante p. 46.

Charges Register (see *Lewisham Borough Council* v. *Maloney* (1)). But none of this confers a legal estate or even an equitable interest on the Crown. The basis of it all is possession. It has sometimes been assumed that when the Crown or its agent or sub-agent posts up a notice of requisition on a house saying that "I have this day taken possession," that that notice in itself, without actual entry, operates to transfer possession to the Crown. That may be so in the case of an empty house, because it may be evidence of sufficient control, coupled with the necessary intent, to constitute possession. But where a house is occupied, then at any rate since the amended reg. 85, which was introduced in February, 1946, the Crown does not take possession merely by posting a notice of requisition in that form on the door. It has no right to enter, unless it serves on the occupier twenty-four hours' notice of the intended entry (see reg. 85); and it has no right to turn out the occupier unless he has disobeyed its direction to give up possession (see reg. 51 (1.A) and (6.)). The Crown cannot by any possibility be said to be in possession of a building which is occupied by another and which it has no right to enter. I agree, therefore, with the second point to this extent, that in this case neither the Crown nor any of its agents took possession. But, even so, the Crown may be able to bring an action for possession, for it has been held that a notice of requisition is not a nullity, even though actual possession has not been taken. Once it is posted on the door it operates as a direction to the occupier to give up possession. He is bound to comply with that direction, and if he does not do so, he is liable to be turned out by force (see reg. 51 (1.), (1.A) and (6.)). He cannot therefore give vacant possession to another: *James Macara Ld.* v. *Barclay* (2); and the court will, if necessary, order him to go.

What is the nature of the action for this purpose, and who can bring it? Can the town clerk bring it in his own name? Trespass does not lie because it is based on actual possession. Nor does ejectment, because that only lies in favour of a plaintiff who can prove a legal title in himself, which the Crown cannot do. It has a statutory power to take possession, but a power and a right are very different things (see Salmond on Jurisprudence, 9th ed., at p. 302). The action is therefore neither trespass nor ejectment but an action in aid of the statutory power to take possession and,

(1) [1948] 1 K. B. 50.

(2) [1945] K. B. 148.

as such, it can be brought in the name of any agent or sub-agent who has been authorized to take possession on behalf of the Crown: see *Lewisham Borough Council* v. *Maloney* (1). It can be brought, therefore, by the town clerk at any time after a notice of requisition has been served. It is not necessary to serve a notice of intended entry under reg. 85, because that only applies to entry without the process of the courts. The second point taken on behalf of Mr. Roberts therefore also fails.

I agree with my brothers, therefore, that the procedural points taken on behalf of Mr. Roberts cannot prevail, and I turn to the substantial point in the case, which is whether the requisition was within the powers conferred on the executive by Parliament. The power to requisition is only given in respect of supplies and services which are essential to the well-being of the community: see reg. 51 and s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945. Housing accommodation is no doubt an essential supply, and the power can be exercised if it appears to the competent authority to be necessary or expedient to take possession of any land for the purpose of so maintaining the supply of housing accommodation as to secure a sufficiency of it. In order to be valid, the requisition must come within that authority or it will be bad: see *The Marquess of Clanricarde* v. *Congested Districts Board for Ireland* in the House of Lords (2); *Sydney Municipal Council* v. *Campbell* (3); and *Carltona Ld.* v. *Commissioner of Works* (4).

On the true interpretation of the regulation, I think it is plain that there are three requisites which must be satisfied before a competent authority can requisition a house: (1.) the competent authority must decide that it is necessary or expedient to take possession; (2.) its purpose in taking possession must be to secure sufficient housing accommodation; (3.) it must act in good faith. There is no doubt here that requisites (2.) and (3.) were satisfied. The decision was made in good faith for securing sufficient housing accommodation. But the question is whether requisite (1.) was satisfied. Did it appear to the competent authority to be necessary or expedient to "take possession of" the ground floor in which Mr. Roberts was living?

Upon this point the material facts are these: (i) At the time of the requisition Mr. Roberts was lawfully in occupation of the ground floor of his own house. He was not there as a licensee, but as freeholder in as full a right as if it had never been requisitioned. (ii) The upper floor was still requisitioned and the town clerk had of necessity an implied right of access to it. Mr. Roberts had no legal justification for refusing access to it. (iii) The competent authority had power to gain full access to the upper floor by giving " directions " under reg. 51 (1.) or " authority " under reg. 85 (1.) (*c*) and then prosecuting Mr. Roberts, if necessary, under regs. 83 and 92: or indeed by requisitioning the entrance passage and staircase of the house. (iv) At the time of the requisition the competent authority had no intention of taking actual possession of the ground floor rooms. They did not contemplate that anyone should occupy these rooms except Mr. Roberts and his wife. No direction was given to him at that time to give up possession. Nor was any notice of intended entry served on him. (v) The purpose of the competent authority was to acquire a legal right to possession of the whole house and to treat Mr. Roberts as their licensee of the ground floor, thus bringing the whole house within their control without actually turning Mr. Roberts out. (vi) When Mr. Roberts still refused to give access to the upper floor, the competent authority, " in order to bring " pressure to bear " on him, threatened to deprive him of the licence which they assumed to exist. Subsequently they did, in fact, purport to terminate the supposed licence and brought this action for possession.

---

(1) [1948] 1 K. B. 50.
(2) (1914) 31 T. L. R. 120.
(3) [1925] A. C. 338.
(4) [1943] 2 All E. R. 560.

Upon those facts, it is clear to my mind that the competent authority did not on November 22, 1946, deem it necessary or expedient to take possession of the ground floor. If that had been their intention, it could only have been effected by directing Mr. Roberts forthwith to give up possession and, if he refused to comply, turning him out. If they had realized that a requisition would have that effect, they would I expect, have hesitated before it appeared to them to be " necessary " or expedient " to do it. They would, no doubt, have considered the alternative of getting an order from the court to ensure access to the upper floor. But those questions did not arise—the letters at the time show that—for the simple and intelligible reason that it was not their intention to take possession at all. Their intention was to get a legal right to possession and to treat Mr. Roberts as a licensee without taking possession themselves. Now a legal right of that kind is nothing more nor less than a legal estate in the land. Their intention was, therefore, in effect, to acquire a legal estate such as would for the time being override the freehold. But Parliament has been very careful not to give the executive any power to acquire any estate in land, but only to take possession of it. They were attempting, therefore, to acquire a legal right or title which they had no power to requisition. See *China Mutual Steam Navigation Co.* v. *Maclay* (1).

My conclusion is that although the officials acted in good faith, they mistook their powers. They had ample powers to compel Mr. Roberts to give access to the upper floor, and they should have exercised those powers. In that way justice would have been done. But, instead of doing that, they have treated themselves as if they were owners of the house and Mr. Roberts as their licensee, a course, which in my opinion, they had no power to take. They have sought to bring pressure to bear on him by threatening to turn him out of his house, and have now carried out the threat and brought these proceedings to eject him. This is a very great power which they claim—to turn a man out of his own house long after the war has ended—and I am not disposed to give effect to it unless I am satisfied, in Lord Greene's words, that "it falls within the four corners of the powers given by the "legislature": see *Carltona Ld.* v. *Commissioner of Works* (2). I do not think it does, and I would allow the appeal.

JENKINS J. The substantial question in this appeal is whether the county court judge was right in holding that the delegation of functions to the town clerk purporting to have been effected by the Ministry's letter of November 12, 1946, was a valid delegation. If it was a valid delegation then (subject to certain more or less subsidiary objections taken by the defendant to which I shall in due course refer) the requisition notice of November 22, 1946, served in pursuance of it was also valid, and afforded a good and sufficient foundation for the plaintiffs' claim to possession. If, on the other hand, the purported delegation was invalid, then it is clear that the requisition notice founded upon it must also have been invalid and a mere nullity, so that the whole basis of the plaintiffs' claim to possession would necessarily be destroyed.

(1) [1918] 1 K. B. 33, more fully reported in 34 T. L. R. 81.

(2) [1943] 2 All E. R. 560.

It is common ground that under para. 1 of reg. 51 of the Defence Regulations, 1939, the Minister of Health (as a "competent authority" within the meaning of the regulation (see reg. 49 (1.)), had power to take possession of No. 24 Boveney Road (even if occupied) for re-housing purposes. It is further common ground that the Minister of Health had express power under para. 5 of reg. 51 to delegate all or any of his functions under para. 1 of that regulation "to such "extent and subject to such restrictions" as he thought proper "to any specified persons or class of persons." If, therefore, the delegation purporting to have been effected by the Ministry's letter of November 12, 1946, is to be regarded as a delegation by the Minister of Health, it would seem to follow that the delegation in question was a valid delegation and that the requisition notice founded upon it was a valid notice. I have not overlooked the fact that in the letter of November 12, 1946, the delegation was expressed to be with respect to "the whole" of No 24 Boveney Road, whereas, actually the upper part was still subject to the original requisition. No point was made of this for the defendant and I am satisfied that if the delegation was otherwise valid, it operated as an effective delegation as to the part of No. 24 Boveney Road, not then subject to requisition.

In considering the question whether the delegation purporting to have been effected by the letter of November 12, 1946, is to be regarded as a delegation effected by the Minister of Health, regard must be had to s. 7 of the Emergency Powers (Defence) Act, 1939, which (so far as material) provides that "every document purporting to be an instrument made "or issued by any Minister . . . . in pursuance of any "provision contained in, or having effect under, Defence "Regulations and to be signed by or on behalf of the said "Minister . . . . shall be received in evidence, and shall, "until the contrary is proved, be deemed to be an instrument "made or issued by that Minister . . . ." The letter of November 12, 1946, is headed: "Ministry of Health," with the address of the Regional Office; it is signed by one J. O'Gara, and it is expressed on its face to comprise a communication which he is directed by the minister to make. It seems therefore clearly to be a document purporting to be an instrument made or issued by the Minister of Health and to be signed by J. O'Gara on behalf of the Minister of Health within the meaning of s. 7, with the result that until the contrary is proved it must be deemed by virtue of the section to be made or issued by the Minister of Health. I think it follows from this that unless the defendant has succeeded in "proving the contrary" the letter of November 12, 1946, must be deemed to constitute a delegation by the minister no less than if it had been signed by the minister himself personally, with the result that, as the minister's power to effect the requisition in question and his power to delegate that function to the town clerk are not in dispute, the defendant's main ground of attack on the validity of the requisition notice of November 22, 1946, must fail.

This accords with the view taken by Lord Goddard C.J. with regard to the effect of s. 7 in relation to a substantially similar letter purporting to delegate the Minister of Health's requisitioning powers with respect to specified premises in *Carlish* v. *East Ham Corporation and Another* (1). Mr. J. O'Gara the signatory of the letter of November 12, 1946, who is a General Inspector at the Ministry of Health, and was at the material time in charge of requisitioning in the London Region, gave evidence before the county court judge, and it was sought on behalf of the defendant to "prove the contrary" out of his own mouth by showing that on his own evidence he had, in fact, no authority to sign the letter of November 12, 1946, on behalf of the minister. It is perhaps surprising that Mr. O'Gara could not be more precise as to the manner in which his authority was conferred and defined, and was unable to point to any specific document or instructions on the subject. But it is clear that according to the internal organization and practice of the department, his duties as the official in charge of requisitioning included the writing of letters of ad hoc delegation such as the letter of November 12, 1946, in the present case, and that he was in fact at the material time writing as many as ten of such letters per week. Whatever might be said of his evidence, if the onus had lain on the plaintiffs to adduce strict proof of his authority, I think it fell very far short of proof that he had no authority, and it is clear that under s. 7 the onus lay on the defendant to prove that he had none. I am accordingly of opinion that the county court judge rightly rejected the defendant's contention that Mr. O'Gara in fact had no authority to sign the letter of November 12, 1946.

The validity of the delegation which Mr. O'Gara purported by this letter to effect on behalf of the minister was further

(1) [1948] 2 K. B. 380.

attacked on the ground that, even if he was in fact authorized by the minister to effect such delegations, in the sense that the duties entrusted to him in terms extended to the making of such delegations, he could only be so authorized as a delegate of the minister's powers with the result that as a matter of law he could not himself validly effect any further delegations, in view of the well-known principle of delegatus non potest delegare. I think this contention is based on a misconception of the relationship between a minister and the officials in his department. A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation as between the minister and Mr. O'Gara seems to me to arise at all. I think this view is borne out by the observations of the present Master of the Rolls in *Carltona Ld.* v. *Commissioners of Works and Others* (1). The delegation effected by the letter of November 12, 1946, must therefore, in my view, be regarded as a delegation by the minister, acting through one of his departmental officials, in the person of Mr. O'Gara and not as a purported delegation by Mr. O'Gara of functions delegated to him by the minister. I am accordingly of opinion that this ground of objection also fails.

It was further argued that, though it might be proper for the minister to perform his functions under reg. 51 through his departmental officials so far as purely executive acts were concerned, the delegation purporting to have been effected by the letter of November 12, 1946, was a legislative act, and as such could only be validly done by the minister personally. Assuming for the moment that the delegation in question can properly be described as a legislative act, I do not see why it should follow on that account that the minister could not do it in the way which his functions under reg. 51 are normally and necessarily performed, i.e., through the appropriate departmental official. Regulation 51 (5.) confers on the minister express power to delegate all or any of his functions under para. 1 and makes no special provision as to the manner in which such power of delegation is to be exercised. I see no sufficient justification for implying a special provision to the effect that it is only to be exercised by the minister himself in person. I do not, however, agree that the delegation here in question was a legislative act. It related simply and solely to the requisitioning of one particular house and delegated nothing more than the power required for that specific purpose. There is, so far as I can see, nothing in the nature of legislation in that. Reference was made to the case of *Blackpool Corporation* v. *Locker* (1), but the court had there to consider the effect of a general delegation to local authorities of the minister's power of requisitioning effected by circulars which laid down what amounted to a code of regulations and restrictions governing the exercise of the delegated powers. I do not think it follows from that case that every delegation of power to requisition, however specific and in particular that even a delegation of power to requisition one particular house, is a legislative act. Still less does it follow that the power of delegation conferred by para. 5 of reg. 51 can only be exercised by the minister himself personally, the mode in which the power should be exercised (i.e., whether by the minister personally, or through his departmental officials) being an aspect of the matter with which the case of *Blackpool Corporation* v. *Locker* (1) was not, as I understand it, concerned. It would certainly cause great embarrassment in the administration of reg. 51 if a specific delegation, such as is here in question, directed simply and solely to the requisitioning of one particular house, could only be effected by the minister himself in person, and I see no sufficient reason for so holding. Accordingly, in my opinion, this ground of appeal also fails.

---

(1) [1943] 2 All E. R. 560.

It remains to consider a number of points of a more or less subsidiary character which were raised on behalf of the defendant. The requisitioning was attacked on the ground that the power of requisitioning was delegated for the purposes set out in the town clerk's letter of November 7, 1946, i.e., "so that the owner may be permitted to occupy the lower "portion as licensee and the proper precautions taken to "reserve the right of access to the upper portion and garden "for the occupants of the upper portion and the necessary "provision made for the sharing of the bathroom and "lavatory." In my view, there is no substance in this contention. The short answer is that, whatever the town clerk may have asked for, what he in fact received was a plain delegation of power to requisition the premises for re-housing purposes. Moreover, I do not think the town clerk's letter can fairly be regarded as doing anything more than stating the reasons why the power asked for was necessary, and the way in which the re-requisitioning, in the event of his being given power to effect it, would enable him to get over the difficulties which were being made by the defendant. Finally, the plaintiffs were perfectly willing to carry out the terms of the letter of November 7, 1946, but were unable to do so because the defendant would not agree.

---

(1) [1948] 1 K. B. 349.

Then it was said that the premises were requisitioned with the ulterior object of putting pressure on the defendant. That is in a sense true. But I see nothing improper in it. The position was that unless control of the whole house could be obtained the upper part was entirely useless for re-housing purposes owing to the defendant's denial of access. Accordingly, the requisitioning cannot on this account be said to have been effected otherwise than bona fide for the purposes of re-housing.

The point was formally taken that the requisitioning was invalid because actual physical possession was not obtained. But it was conceded that so far as this court is concerned that ground of objection is concluded adversely to the defendant by the decision in *James Macara Ld.* v. *Barclay* (1).

Finally, a question was raised as to the capacity of the plaintiffs to sue, but I understood counsel for the defendant to concede, in effect, that if the delegation effected by the letter of November 12, 1946, was valid, the town clerk on requisitioning the property in exercise of the delegated power would have a sufficient interest in and right to possession of the property to enable him to maintain an action for possession. For all these reasons I am of opinion that the county court judge came to a right conclusion in this case and I agree with my Lord that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for the defendant: *Tanner and Worley.*

Solicitors for the plaintiffs: *Sharpe, Pritchard & Co., for Alan Milner Smith, Town Clerk, Lewisham.*

C. G. M.

(1) [1945] K. B. 148.

Applied. BRITISH MOVIETONEWS, LTD. *v.* LONDON AND DISTRICT CINEMAS, LTD. [1950] 2 All E.R. 390.

Followed. BRITISH MOVIETONEWS *v.* LONDON AND DISTRICT CINEMAS [1951] 1 K. B. 190

C. A.

1949
May 11, 12, 13, 16, 17; *June* 22.

Cohen, Asquith and Singleton L.JJ.

PARKINSON (SIR LINDSAY) & CO. LD. *v.* COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS.

Explained. BRITISH MOVIETONEWS LD. *v.* LONDON AND DISTRICT CINEMAS LD. [1952] A.C. 166

Contract—Building contract—Construction—Estimate of works at cost of 5,000,000l. by date of completion—Payment at cost plus maximum net profit of 300,000l.—Extras ordered under contract at cost of additional 2,000,000l.—Protest made by contractors—Completion thereby delayed for a year—Claim for additional net profit, on quantum meruit.

By a contract dated January 6, 1937, contractors agreed with H. M. Commissioners of Works and Public Buildings to erect an ordnance factory according to general conditions, specifications and bills of quantities and drawings annexed, for the contract sum of 3,500,000*l*. The works were to be completed by January 30, 1939. Under general condition 33 the Commissioners had power, at their absolute discretion, to modify the extent and character of the work or to order alterations of or additions to the works and it was the duty of the contractors to comply with the architect's instructions in this respect. Item No. 57 in bill of quantities No. 1 included a note in these terms: "It is probable that further "work to the value of approximately 500,000*l*. will be ordered "on a measured basis under the terms of the contract." Under condition No. 29 the contractors were liable to be called on to pay liquidated damages of 5,000*l*. a week if they did not complete by January 30, 1939. Since delay was caused through the act or default of the Commissioners, the contractors became entitled to an extension of time, but the Commissioners were most anxious that the factory should be completed by January 30, 1939. By a deed of variation of August 18, 1937, between the same parties it was provided that exceptional methods should be used to hasten the work and that a system of uneconomic working should be introduced to bring about completion by the date fixed by the contract.

Under the original contract payment had to be made prima facie, according to the priced bills of quantities, and extras had to be paid for on the same footing, which included profit or remuneration for the contractors. Under the deed of variation, the method of payment was prima facie to be ascertained on the basis of such net rates or prices as should be agreed upon between the architect and contractors, or failing agreement, should be fixed by arbitration. It was further agreed by the deed that the sum eventually to be paid to the contractors should not be less than the actual cost to them, as defined, plus a net profit or remuneration of 150,000*l*., and should not be greater than the actual cost plus a net profit or remuneration of 300,000*l*. The obligation to complete by a certain date disappeared, but the contractors undertook to use their best endeavours to complete by January 30, 1939, and to use exceptional methods in their effort to do so.

C. A.

1949

Parkinson (Sir Lindsay) & Co. Ld. *v.* Commissioners of His Majesty's Works and Public Buildings.

It was found by an arbitrator that the contractors on the information available to them in August, 1937, estimated that the cost of the work which they would be called on to execute would be 3,500,000*l.*, the sum mentioned in the original contract, plus the 500,000*l.* referred to in the note to item No. 57 in bill of quantities No. 1, plus another 1,000,000*l.* additional cost for the exceptional methods and uneconomical working adopted in the interest of speedy completion under the deed of variation,—5,000,000*l.* in all. The arbitrator said that there was no evidence enabling him to answer the question whether or not the Commissioners had in mind any different estimate at that time. In the case of subsidiary contracts between the parties the minimum and maximum profits were based on 3 per cent. and 6 per cent. respectively of the cost or estimated cost of the work involved. If these percentages were applied to the minimum and maximum net profits of 150,000*l.* and 300,000*l.* under the original contract, as varied by the deed of variation, it would appear that the estimated cost of the work under the varied contract in August, 1937, was 5,000,000*l.*

The Commissioners ordered work to be executed greatly in excess of the amount so contemplated, although not different in character from that covered by the varied contract, so that the works were not completed until a year beyond the time anticipated—there being no suggestion of delay on the part of the contractors—and the actual cost to the contractors was 6,683,056*l.*, which amount had been paid to them along with 300,000*l.* the maximum profit under the deed of variation. During the progress of the work the contractors had complained to the Commissioners that they were being called on to execute more work than was contemplated by the varied contract and claimed that they were entitled to extra remuneration for work in excess of that contemplated; but they proceeded with the work at the request of the Commissioners, leaving the issue to be subsequently decided by arbitration.

The contractors claimed a net profit or remuneration in excess of the 300,000*l.* fixed by the deed of variation. It was contended for the Commissioners that notwithstanding the provision of a maximum net profit of 300,000*l.* they had a right to order extras under condition 33 of the original contract, as varied, to an unlimited amount provided the extras ordered were within the scope of the project—as they were—and were not of such a quantity as to render the contract fantastic and absurd. The character of the adventure, they contended, must be changed (as in *Bush* v. *Whitehaven Trustees* (1888) 52 J. P. 392; Hudson's Building Contracts (4th ed.), vol. 2, at p. 122) before a party could claim to be discharged from his or her obligation under the contract, and they relied on the finding of the arbitration that the quantity and value of the extra work executed was not different in character from that covered by the varied contract.

Held: (1.) that the basis of the varied contract was that the quantum of work which the Commissioners were entitled to require was work measured approximately by the sum of

5,000,000*l.*; and (2.) a term must be implied in the varied contract that the Commissioners should not be entitled to require work materially in excess of that sum. It followed that such excess work having been done by the contractors, at the request of the Commissioners, the latter were liable to pay the former reasonable remuneration therefor, on the basis of a quantum meruit.

Bush v. *Whitehaven Trustees* (1888) 52 J. P. 392 (Divisional Court); Hudson on Building Contracts (4th ed.) (Divisional Court and Court of Appeal), vol. 2, 122, followed.

Decision of Lewis J. affirmed.

APPEAL from a judgment of Lewis J., on a case stated by an arbitrator.

The facts were stated by Cohen L.J. as follows: This dispute arose out of a contract between Sir Lindsay Parkinson and Co. Ld. and the Commissioners of His Majesty's Works and Public Buildings, referred to hereafter respectively as "the contractor" or the "contractors" and the "Commissioners." In 1936 the contractors were invited to tender for the erection of an ordnance factory at Chorley in Lancashire. On January 6, 1937, their tender was accepted. The original contract, which was reduced into writing, bore the same date, but it was not in fact signed until April 1, 1937, on which date a letter was also signed modifying the conditions of the contract in certain particulars. The contract recited the acceptance of a tender whereby the contractors undertook to erect the ordnance factory according to the general conditions of the contract, specifications and bills of quantities and drawings annexed to the contract.

By cl. 1 the contractor covenanted to execute the works set out in the annexed documents in a thoroughly sound and workmanlike manner in accordance in every respect with the requirements, stipulations and conditions of the said annexed documents. Clause 2 read as follows: "In "consideration of the covenant for the payment by the "Commissioners hereinafter contained the contractor hereby "covenants with the Commissioners that the contractor "will execute and complete in a thoroughly sound and "workmanlike manner all the works set out in the said "specifications bills of quantities and drawings in accordance "in every respect with the requirements stipulations and "conditions of the said general conditions of contract "specifications bills of quantities and drawings." Clause 3 declared that the provisions of the general conditions of the contract, specifications and bills of quantities should be as binding upon the contractors and upon the Commissioners as if the same had been repeated in the contract and should be read as part of the contract.

The material general conditions were the following: Condition I was a definition clause and contained the following definition of " works " : " ' The Works ' shall mean the works " indicated on the drawings and/or described in the specifi- " cations and/or bills of quantities including all modified " extra or additional works and all obligations to be performed " under the contract." By condition 2 the contractor was bound to carry out the work in accordance with the directions of the Commissioners' architect, who was authorized to give directions inter alia as to (*a*) variations or modifications of the design, quality or quantity of the works or the addition to or omission or substitution of any work pursuant to condition 33 (I.): " Any other matter not in condition 2 " particularly described." Condition 2 ended as follows: " The contractor shall from time to time forthwith comply " with all the architect's instructions and duly execute any " work comprised therein. The contractor shall not be entitled " to any compensation additional allowance rate or payment " or extension of time for completion by reason of his " compliance with the architect's instructions, except in those " cases where specific provision to that effect is contained in " these conditions." By condition 3 it was provided that the contractor should have no claim for additional payment by reason of certain specific matters and that the contractor should not be relieved from any risks or obligations imposed on or undertaken by him under the contract on any of the grounds therein specified or on the grounds—and some reliance was placed on these words—that he could not or did not foresee any matter which might in fact affect or have affected the execution of the work. Condition 5 provided for day and night work in certain conditions. Condition 27 gave the Commissioners power to suspend or determine the contract at their discretion but gave the contractors a right to reasonable and just compensation if the suspension or determination should not have been occasioned by the failure of the contractors to observe the provisions of the contract or should not have been ordered under condition 26 which dealt with suspension for frost, etc. Condition 27 fixed the date for completion as January 30, 1939, but subject to an extension of time in a number of events, including inter alia (*a*) if the contractors should be required to execute any modified or additional work. Condition 29 provided for the payment of liquidated damages by the contractors of 5,000*l.* a week if the work should not be completed and the site cleared on or before the date for completion.

Condition 33, which dealt with alterations, additions or omissions, was in the following terms: "The Commissioners "shall have power from time to time by written instructions "to the contractor from the architect at their absolute "discretion to modify the extent, character, sections, quantities "or dimensions of the work shown or described in the contract "or the levels or positions of any of the works or to order "any portion or portions of the works to be omitted with or "without substitution of any other works in lieu thereof "or to order any work or any portion of any work executed "or partially executed, to be removed, changed or altered, "or to order additional works, or to change the nature of "the materials with which the works are intended to be "constructed, without vitiating or in any way making void "the contract and the contractor shall upon the receipt of "written instructions before mentioned make such alterations "and changes or as the case may be perform such extra and "additional works in the same manner as nearly as the "circumstances will admit as if the same had originally formed "part of the works. The value of all alterations, omissions "or abandonments ordered as aforesaid shall be ascertained "in accordance with condition 35 hereof and shall be added "to or deducted from the contract sum as the case may be." Although, therefore, the contract fixed a price and date for completion, both price and date were plainly elastic having regard to the very wide scope of condition 33 and to the provisions for varying the price and date of completion if the Commissioners should exercise their right thereunder.

Condition 35 dealt with the valuation of alterations, additions and omissions and provided that unless previously or otherwise agreed the valuation should be made in accordance with the provisions therein set forth which, so far as material, were as follows: "(*a*) The net rates or prices in the bills of "quantities shall determine the valuation of work of similar "character executed under similar conditions as work priced "therein. Where the net rates or prices do not apply, but "where there shall have been no change in the conditions "of execution of the work, the value shall be based upon "prices deduced therefrom so far as it is practicable to do so; "(*b*) If it is not practicable, or (by reason of a change in the "conditions of execution of the work) not reasonable, either "to apply the net rates or prices in the bills of quantities "or to deduce net rates or prices therefrom the said value "shall be ascertained on the basis of such net rates or prices "as shall be agreed upon between the architect and the "contractor, or failing agreement, fixed by arbitration under "condition 58 hereof; (*e*) In the case of alterations additions "or omissions which are valued otherwise than as daywork "there shall be added to the contract sum any increased "cost in respect of preliminaries (other than water or "insurance) mentioned or referred to in bill No. 1 of the "bills of quantities actually incurred by the contractor by "reason of any such alterations or additions and there shall "be deducted from such sum any saving or decrease in cost "in respect of such preliminaries (other than as aforesaid) "effected by the contractor by reason of or resulting from any "such alterations or omissions." Condition 37 provided that the description and quantity of the work covered by the contract sum should be deemed to be that which was set out in the bills of quantities and that any error therein or omission therefrom should not vitiate the contract nor release the contractor from his obligations but should be rectified or treated as an alteration addition or omission as the case might be under condition 35. Condition 41 provided for advance payments to the contractors during the progress of the work of 90 per cent. of the value of the work from time to time certified by the architect, the balance of 10 per cent. being retained by the Commissioners until the retention moneys should be 100,000*l*. Condition 58 was the arbitration clause, under which the dispute was afterwards referred to arbitration.

Of the bills of quantities, bill No. 1 alone was referred to. Item 1 therein described what was called the scope of the contract. Item 33 stated that the next 34 items were extracts from the general conditions, and among those 34 items was the following: "Alterations additions or omissions. The "prices in these bills of quantities shall not in any way be "affected by any alterations additions or omissions being "made to the works. (Clause 33) Note: It is probable that "further work to the value of approximately 500,000*l*. will "be ordered on a measured basis under the terms of the "contract." The arbitrator found and the learned judge agreed that that note to Item 57 had no contractual effect and the arbitrator said: "Whilst this note is not contractual "in the sense of obliging the Commissioners to order such "further work or giving rise to a claim by the contractors "if such further work is not ordered it constitutes a representation as to the scope of the contract having regard to cl. 33 "of the conditions of the contract (which is in wide terms) "and item 57 in the bills of quantities is a direct reference "to cl. 33 of the conditions of contract. The object of such "a note is to place the contractor in a position to gauge "the probable ambit of the contract and to price the bills "of quantities accordingly having particular regard to the "time required for completion and the probability of the "work being executed in the time stipulated in the invitation "to tender." The letter of April 1, 1937, which formed part of the contract, provided for adjustment of the contract price in the event of a change in (*a*) the price of structural steel, or (*b*) the wages of workmen pursuant to a national agreement and made certain other modifications to which I need not refer.

The history of the contract taken from the arbitrator's award and from his findings of additional facts pursuant to a direction of the learned judge in the court below was as follows: The works proceeded, but owing to the contractors not receiving information in time, they became entitled to an extension of time for the completion of the works. As, however, the Commissioners still desired the works to be completed not later than January 30, 1939, negotiations took place between the parties. In the result two letters both bearing date August 12, 1937, were exchanged between the parties. These letters were not referred to in or annexed to the award, but by agreement between the parties were read to the court. The letter from Mr. Dyke, on behalf of the Commissioners, to the contractors was in the following terms: "I have to refer to the meeting at this office yesterday on the "question of the methods to be adopted for the expedition "of the works in order to ensure that completion should "take place not later than January 30, 1939. It was "understood to this end that you are willing to introduce "such measures as are necessary on the following basis: "(1.) You are to be guaranteed a net profit of 150,000*l.* as a "minimum and 300,000*l.* as a maximum. (2.) You are "to furnish monthly statements of cost certified by chartered

"Accountants. (3.) It is understood that the operation of "the contract has resulted in a profit to you of approximately "11 per cent. It will be helpful if this figure can be confirmed. "I shall be glad to hear that this letter correctly sets forth "the proposals you wish to be considered by this department." On the same day the contractors expressed their general agreement with the terms of the letter, subject to one exception which they described as important, but which had, no bearing on the matter before the court. These letters are obviously not admissible in the construction of the contract, which was made as a result of them and which was reduced into formal shape, nor in my opinion do they, even if admissible, throw much additional light on any other aspect of the matter.

As the result of those negotiations a deed of variation was drawn up and was executed on August 18, 1937. That deed, after reciting (1.) the original contract to carry out the work for a sum of 3,505,834*l.* 7*s.* 7*d.* adjusted as might be necessary in accordance with the provisions of the general conditions of contract; (2.) the letter of April 1, 1937, amending the said original contract; and (3.) a deed of assignment by which the rights of the original contractors were assigned and vested in the contractors with the consent of the Commissioners contained the following further recitals: "And whereas the "date stipulated to the general conditions for the completion "of the works is January 30, 1939, or in the case of any "extensions of time as provided for by the general conditions "then the date of expiry of such extensions. And whereas the "contractor has entered on the execution of the works and "the same have been in part completed and the contractor "has become entitled under the general conditions to extensions "of time for completion of the remainder of the works but the "Commissioners are desirous that the works shall nevertheless "be completed not later than the said January 30, 1939. "And whereas the contractor has satisfied the Commissioners "that so far as concerns the part of the works already completed "as aforesaid the contract has proved profitable to the "contractor and that the contract if normally completed in "its entirety under and with any extensions of time properly "allowable by the existing terms and conditions thereof" —I think something has got missed out, and between the words "contract" and "if normally completed" the following words should appear "may be expected to prove profitable "throughout to the contractor." The next recital said:

"And whereas the parties are agreed that completion by "January 30, 1939, cannot be effected unless exceptional "methods are used including where practicable and desirable "the employment of machinery where in ordinary circumstances it would not be economical so to do, by increase of "employment of labour day and night, by the purchase of "materials in advance of definite requirements and by "disregarding, where necessary to achieve the object, the "economic sequence of the work. And whereas the Commissioners recognize that if such exceptional methods are used "prices for future work will prima facie but not necessarily "come to be valued under cl. 35 (*b*) of the conditions of "contract." The words "prima facie but not necessarily" in the last recital are at first sight a little difficult to understand, but Sir Valentine Holmes for the contractors suggested, I think rightly, that the reason for the words was that the price of materials, for example, the price of a brick would not be affected by the adoption of the exceptional methods referred to in the previous recital and would, therefore, not come to be valued under condition 35 (*b*).

Clause 1 of the operative part of the deed was as follows: "The contractor will use his utmost endeavours to complete "the works by or before January 30, 1939, and will for that "purpose use exceptional methods as aforesaid and generally "will take and prosecute all steps and measures reasonably "practicable for the purpose of completing the works by or "before the said date or as soon thereafter as practicable." Clauses 2 and 3 contained corresponding obligations on the Commissioners to do certain things in order to facilitate the completion of the work by the contractor before January 30, 1939. Clause 4 was in the following terms: "The sum to be "paid to the contractor is to be calculated in accordance with "the provisions of the contract and in particular the value "of the works is to be ascertained, prima facie but not "necessarily, in accordance with condition 35 (*b*) of the general "conditions of contract. Provided always that the sum "eventually to be paid to the contractor shall be not less "than the actual cost as hereinafter defined plus a net profit "remuneration of 150,000*l.* and shall not be greater than the "said actual cost plus a net profit remuneration of 300,000*l.*" It is this clause which has given rise to the dispute between the parties. For the ultimate cost of the work far exceeded the figure specified in cl. 1 of the original contract plus the sum of 500,000*l.* stated in the note to item 57 in the bills of quantities as being the probable amount of the extras to be ordered under condition 33 of the general conditions, and the contractors contend that the profit limit of 300,000*l.* cannot have been intended to apply to so large an increased cost. Clause 5 provided for the calculation of the annual cost and it is common ground that this clause covered every conceivable item of cost. Clauses 6 and 7 are immaterial. Clause 8 was strongly relied on by Sir Valentine Holmes for the contractors and was in the following terms: "Without "prejudice to the right of the contractor to show that advances "due under condition 41 of the general conditions of contract "are in excess of the amounts paid from time to time the "Commissioners shall pay on monthly account to the contractor "during the currency of the works such sum as shall bring "the amount paid to the contractor in respect of the work "to the actual cost incurred by him plus such proportion "of 150,000*l.* as shall represent the proportion of the amount "of work executed to the whole of the work. Provided always "that at the option of the Commissioners they may keep in "reserve a sum not exceeding 100,000*l.* and interest on such "sum at 4 per centum per annum shall be deemed to be part "of the actual cost under cl. 5." Clause 9 provided for the adjustment of the amount payable by way of advances to the contractors so as to ensure that the contractors do not receive more than 300,000*l.* payment on account of profits. Clause 10, on which the Commissioners rely, was in the following terms: "This deed shall be complementary to the contract "and the contract and all the terms provisions and conditions "thereof shall be read and construed subject to the provisions "of this deed but subject as thereby varied shall be and "continue of full force and effect." This clause, they say, preserved the rights to which they claim to be entitled under the original contract to order extras to an unlimited amount provided the extras ordered were within the scope of the project and were not of such a quantity as to render the contract fantastic or absurd.

The deed having been thus varied the work proceeded. In about September, 1938, when the payments to the contractors amounted to approximately 4,500,000*l.*, including payments in respect of the expeditious and uneconomical working, the contractors at the request of the Commissioners supplied further information to assist the Commissioners in making a further indent on the Treasury. It is suggested that this application for information was necessary because the Commissioners had originally estimated the work at an amount which was nearing exhaustion. On November 5, 1938, the contractors wrote to Sir James West, the chief architect of the Commissioners, claiming that they were being called upon to execute more work than was contemplated by the varied contract and that they were entitled to extra remuneration for work in excess of the contemplated work. In the same letter they pointed out that they thought their cost of finishing the work (without remuneration) would be not less than 6,000,000*l.* on the basis that no further work would be ordered before completion. Some discussions took place, but on July 12, 1939, one Goodale, on behalf of the Commissioners, refused to recommend any increased payments alleging that when the deed of variation was entered into the full character and extent of the work involved could be and was no doubt clearly appreciated by the contractors. The contractors then proposed to suspend all work unless they were paid additional remuneration, but continued with the work on the understanding that their claim for additional remuneration would be referred to arbitration. The job was completed early in 1940, at a cost far in excess of the original estimate, the actual cost being 6,683,056*l.* to which the Commissioners added the maximum profit of 300,000*l.* allowed under cl. 4 of the deed of variation. The contractors refused to accept this sum as being a final settlement of their claim under the varied contract, contending (*a*) that the minimum and maximum profit had been fixed on the basis of a sum of approximately 5,000,000*l.* made up of the following elements: 3,500,000*l.*, the original cost price, 500,000*l.*, the approximate limit indicated in the note to item 57 in the first bills of quantities, 1,000,000*l.*, being the estimated amount of additional expenditure arising from the adoption of exceptional methods; (*b*) that this calculation was in the contemplation of both parties and that accordingly they were entitled to additional profit in respect of work done at a cost in excess of this sum of approximately 5,000,000*l.*

It is to be observed that having regard to the correspondence to which I have already referred this claim was not an afterthought by the contractors. I should add that certain subsidiary contracts were entered into in respect of which the contractors were paid additional remuneration. The arbitrator has found that there were minimum and maximum profits fixed in the subsidiary contracts and that they were based on 3 per cent. and 6 per cent. respectively of the cost or estimated cost of the work involved. The contractors suggest that the minimum and maximum profits fixed in cl. 4 of the deed of variation were based on similar percentages of the 5,000,000*l.*, which they say was the agreed estimated cost of the work contemplated when the deed of variation was executed. This, however, is disputed by the Commissioners.

The Commissioners persisted in their rejection of the demand of the contractors for remuneration in excess of the maximum of 300,000*l.* fixed by cl. 4 of the deed of variation and the dispute was referred to the arbitration of a distinguished architect, Mr. Woodward, under cl. 58 of the original contract. Pleadings were directed and the contentions of the contractors are set out in paras. 8–11 of the Points of Claim. Paragraph 8 contains the contentions as to the contemplated work and the method of ascertaining the minimum and maximum fixed by cl. 4 of the deed of variation, which I have already stated. In the paragraph the work represented by the original sum of 3,506,584*l.* plus the allowance of 500,000*l.* for extras made in item 57 of bill No. 1 is referred to as " the stipulated work." Paragraphs 9, 10 and 11 are as follows : " 9. In the circumstances aforesaid and from the custom of the industry to relate profit remuneration to the cost or estimated cost of the work to be done it was to be implied as a term of the varied contract that should the work carried out by the contractors substantially exceed in quantity and value the stipulated work the contractors should be paid a proportionate or alternatively a reasonable profit remuneration on the cost of such excess work. 10. Alternatively upon the true construction of the varied contract the proviso to cl. 4 of the supplementary contract applied only to the stipulated work, and the contractors were entitled to be paid for work in excess of the stipulated work a sum calculated in accordance with the provisions of the contract and prima facie but not necessarily in accordance with condition 35 (*b*) of the general conditions of contract. 11. In the further alternative upon the true construction of the varied contract the Commissioners were not entitled to require the contractors to execute thereunder work in excess of the stipulated work." Paragraphs 12 and 13 contain figures which are now agreed as representing the cost of the work on various bases. From this it appears that measured and valued at the prices in the said bills of quantities the cost was 6,263,296*l.*, while measured and valued in accordance with condition 35 (*b*) pursuant to cl. 4 of the deed of variation the cost was not less than 7,471,238*l.* There were attached to the pleadings schs. A and B. Schedule A. showed that taking measurements and not values, the amount of the work on a number of items such as excavation, planking, strutting, etc., were very largely increased, the amount for excavation, for instance, being more than doubled. Schedule B. contains similar particulars as regards values.

The Commissioners contended that the contractors' claim had no foundation in law and in particular they said that the note to item 57 in bill of quantities No. 1 had no contractual or other effect on the legal relations between the parties and that the true position was as set out in paras. 8 and 12 of their answer. Paragraph 8 so far as material was in the following terms: "The Commissioners deny that the varied contract "referred to in the points of claim is to be construed as "containing any such implied term as is alleged in para. 9 "of the points of claim. In point of fact, as both parties "fully understood when the contract was negotiated and made "between them, the Commissioners had not at that time "decided what work would eventually be required to be carried "out at the factory in question and the contract was "accordingly drawn up in such terms as would, by the operation "of the provision as to omissions, variations and additions, "enable the Commissioners when they eventually decided "what their requirements were, to order what they wanted "to be done without there being any question of any such "work being outside the contract. Neither expressly nor "by implication did the parties at any time agree upon any "maximum limit regarding the amount or value of the work "to be covered by the contract, and to imply any such "limitation, were it possible to do so, would be to contradict "the express terms of the said contract." Paragraph 12 concludes as follows: "All the work in respect of which "the contractors here claim was either work expressly provided "for by the varied contract or work executed as the result "of instructions given to them under the provisions of the "varied contract which empowered the Commissioners to "vary and add to the contract work and, having accepted "and acted upon such instructions, it is not open to the "contractors to allege that such work or any part of it was "either work not contemplated by the varied contract, or "work in respect of which they are entitled to be paid any "sum in addition to that expressly provided by the varied "contract to be paid."

The arbitrator made his award in the form of a special case. I have already referred to most of his findings, but I think I should read paras. 2, 3 and 4 of his award: they are in the following terms: "2. That the quantity and value of work "executed though not different in character from that covered "by the varied contract was largely in excess of the quantity "and value of work the subject of the varied contract. The "contract time of two years for completion was not sufficient "in which to execute the excess quantity of work in addition "to the quantity of work in the varied contract. 3. That it "is a well recognized usage in the building industry to relate "profit remuneration to the actual or estimated costs of the "work and to the time required to execute the work. 4. That "the quantity of work and the time required to execute "such work was so varied and extended that if the Commissioners' contentions are upheld the aforesaid trade usage "would in this case be rendered of no effect." Sir Valentine did not contend that there was any trade custom to be incorporated into the contract. He relied on findings 3 and 4 to support his contention that the 5,000,000*l.* was in the contemplation of both parties since the Commissioners were familiar with building contracts of this kind and must be taken to know that without some such agreed basis the contractors could not calculate the prices at which they would tender. I may mention here that the arbitrator was in considerable difficulty in dealing with the question of what was in the contemplation of the parties, as Col. Parkinson, who had negotiated the matter on behalf of the contractors, was dead and the Commissioners did not call Sir James West who had dealt with the matter on their behalf. On the documents and facts the arbitrator stated the questions for the opinion of the court as follows: "(1.) Whether on the "true construction of the varied contract the contractors "are entitled to be paid a proportionate or reasonable profit "or remuneration in respect of the 'excess work'? "(2.) Whether in the alternative the contractors are in law "entitled to be paid for the excess work on the basis of a "quantum meruit, as work not coming within the scope

" of the contract ? (3.) Whether in the further alternative " the contractors are in law entitled to be paid for the whole " of the work executed by them on the basis of a quantum " meruit ? " If either the first or second question were answered in the affirmative the arbitrator said that his award would be for 90,298*l*.

When the matter first came before Lewis J., he decided that more information was required to enable him to reach a conclusion and remitted the matter to the arbitrator to answer a series of 15 questions. The answers of the arbitrator, like the award, are set out in full in the judgment of Lewis J. It is sufficient for my purpose to refer to the following passages. In para. 1, he found : " That on or before August 18, " 1937, there was not any information available to the con- " tractors and no instructions had been given to them indicating " that they would be called upon to execute work which would " exceed the ' stipulated work ' as defined in para. 8 of the " points of claim either in quantity or when measured and " valued on a comparable basis. That on July 5, 1937, Sir " James West on behalf of the Commissioners called upon " the contractors to supply a complete time and progress " schedule of the work to be carried out and early in August, " 1937, the contractors informed Sir James West that it " would be possible to complete the work by the original " contract date (January 30, 1939) if abnormal methods were " used." In para. 2 (*a*) he found : " That when the con- " tractors entered into the varied contract and agreed to " take a minimum and maximum profit they did not know " and had no reason to believe that the ultimate quantity of " work would or might be greater than work valued at " 4,000,000*l*. or thereabouts at bills of quantities prices." (3.) I read only the first sentence : " That on August 18, " 1937, the extent of the work which the contractors were " ultimately called upon to execute was not and could not have " been appreciated by them." " (4.) That the contractors " on the information available to them in August, 1937, " estimated that the cost of the work which they would be " called upon to execute would be in the neighbourhood of " 4,005,834*l*. plus 1,000,000*l*. as mentioned in para. 1 (*k*) of " my award of August 22, 1947. There was no evidence " enabling me to answer the question as to whether or not " the Commissioners had in mind any different estimate at " that time." Then (5.) " That by August 12, 1937, the

" contractors had only executed work to the value of 459,910*l.* " and this showed a profit of 16 per cent. (6.) That as stated " in para. 1 hereof, on July 5, 1937, Sir James West on behalf " of the Commissioners called upon the contractors to supply " a complete time and progress schedule of the works to be " carried out and the contractors early in August, 1937, " informed Sir James West that it would be possible to complete " the work by the original contract date (January 30, 1939) " if abnormal methods were used." Then (12.) " That the " increases in the minimum and maximum profits provided " for in the subsidiary contracts were based on 3 per cent. " and 6 per cent. respectively of the cost or estimated cost " of the work involved."

It is further stated in the answer to question 14 that the contractors erected 667 buildings instead of the 468 described in the original specifications and bills of quantities, but that there was no evidence on which to base any comparison between the type of the 468 buildings and the 667 buildings. Before Lewis J., as before us, the principal authority on which Sir Valentine relied was *Bush* v. *Whitehaven Trustees* (1). Lewis J. carefully considered that case and also several cases laying down principles to be applied in considering whether a term which is not expressed can properly be implied in a contract. I shall have to refer later in some detail to *Bush* v. *Whitehaven Trustees* (1), but it will be convenient first to state the conclusion of Lewis J. therefrom. After referring to the judgments of this court in *Bush* v. *Whitehaven Trustees*, Lewis J. said that Lord Esher M.R. holds to be right the principle laid down in *Jackson* v. *Union Marine Insurance Co. Ld.* (2), namely " that you are to look and see what were the " circumstances under which the contract was made in con- " struing the contract, and you have to see whether what has " happened was an event which was in the contemplation of " the parties when they contemplated it "—that, I think, must be a slip and should be " when they made it "—and it goes on, " and if it was not you are entitled to construe that " particular clause of the contract (having looked at the whole " of the contract also, of course) to see whether or not it can " clearly be said that the interpretation put upon it by one

---

(1) (1888) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C.A.).

(2) (1874) L. R. 10 C. P. 125.

"side is an interpretation which could be the right interpretation, bearing in mind what was in the mind of the parties when they entered into the contract."

Lewis J., having stated this principle continued: "I do not propose to read the whole of those extremely useful judgments in that very well-known case, but in my view they laid down the principle which I have endeavoured to enunciate, and on the facts of this case I am satisfied that it was never contemplated, when the deed of variation was entered into, that the limit of profit clause was to be applied to the variations (which amounted, as I have said, to something like 2,000,000*l*.) and that the contractor was not to be paid on some other basis and he had got to look only to his maximum profit for remuneration for the additional work which was imposed upon him after that varied agreement was entered into. I am quite satisfied that that was never in the contemplation of the parties." Lewis J. then gives his reasons for thinking that this large increase in the amount of work was no more in the contemplation of the Commissioners than it was in the contemplation of the contractors, saying: "The arbitrator has found that it was never in the contemplation of the contractor and this is his finding, which I hope I am paraphrasing correctly: they could not know, and they had no idea and no reason to believe that there would be these large increases. About the Commissioners, he says: 'I cannot tell you what they thought because I have no evidence before me of that and after all the test is: what did the parties contemplate?' I cannot believe that if those who negotiated this deed of variation had in mind that they were dealing on the basis of putting in that clause on the basis that they were contemplating a very great increase in the amount of work which the contractor is going to be asked to do they would not have said so—but they did not. Please do not let it be thought that I am suggesting anything like bad faith—of course, I am not—but I should have thought that the Commissioners, when dealing with a thing, if they had that in their minds, would have gone out of their way to make it quite clear to Sir Lindsay Parkinson & Co. Ld., and said: 'True we have put 500,000*l*. in the original contract as the probable amount of additional work that we shall want, but do not let us have any misunderstanding about that; we are entering into this varied contract

" ' now and we know we may want something like 2,000,000*l*.' " I cannot believe that if they had contemplated that they " would not have made it perfectly clear to Sir Lindsay " Parkinson & Co. Ld. The arbitrator found that Sir Lindsay " Parkinson & Co. Ld. did not contemplate it and had no " reason to contemplate it, and I think the proper inference " to draw from that is that just as Sir Lindsay Parkinson " & Co. Ld. had no reason to contemplate it, so also had the " Commissioners no reason to contemplate it."

He concludes by answering the first two questions in favour of the contractors, leaving the third question unanswered. It was agreed that his Lordship's intention was to answer the first question in the negative and the second in the affirmative.

The Commissioners appealed.

Rewcastle K.C. and *Dingle Foot* for the Commissioners.

Sir Valentine Holmes K.C., *E. J. Rimmer* and *R. D. Stewart-Brown* for the contractors.

The argument on which this case is reported, appears fully from the judgment of COHEN L.J.

Cur. adv. vult.

June 22. COHEN L.J. Mr. Rewcastle attacked the judgment of Lewis J. on two grounds: first, he said that it was inherent in the learned judge's decision that he was importing into the varied contract a term that the limitation on profit thereby imposed was not to apply if the extras ordered brought the total valuation of the contract work beyond the sum of approximately 5,000,000*l*. He relied on the observations of Lord Wright in *Inland Revenue Commissioners* v. *Raphael* (1), where the learned Lord said (2): " I must however deal " shortly with the authorities which have been so strenuously " urged on behalf of the appellants as leading to the contrary " conclusion. It must be remembered at the outset that the " court, while it seeks to give effect to the intention of the " parties, must give effect to that intention as expressed, " that is, it must ascertain the meaning of the words actually " used. There is often an ambiguity in the use of the word " ' intention ' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state

(1) [1935] A. C. 96. (2) Ibid. 142.

"of mind, and not as meaning intention as expressed. The "words actually used must no doubt be construed with "reference to the facts known to the parties and in contemplation of which the parties must be deemed to have "used them: such facts may be proved by extrinsic evidence "or appear in recitals: again the meaning of the words used "must be ascertained by considering the whole context of "the document and so as to harmonize as far as possible all "the parts: particular words may appear to have been used "in a special sense, which may be a technical or trade sense, "or in a special meaning adopted by the parties themselves "as shown by the whole document. Terms may be implied "by custom and on similar grounds. But allowing for these "and other rules of the same kind, the principle of the common "law has been to adopt an objective standard of construction "and to exclude general evidence of actual intention of the "parties; the reason for this has been that otherwise all "certainty would be taken from the words in which the "parties have recorded their agreement or their dispositions "of property. If in some cases hardship or injustice may be "effected by this rule of law, such hardship or injustice can "generally be obviated by the power in equity to reform the "contract in proper cases and on proper evidence that there "has been a real intention and a real mistake in expressing "that intention: these matters may be established, as they "generally are, by extrinsic evidence. The court will thus "reform or re-write the clauses in order to give effect "to the real intention. But that is not construction, but "rectification."

Applying that statement of the law to the present case, he said that the varied contract was plain and unambiguous; Condition 33 of the original contract gave the Commissioners an unlimited power of ordering extras even to the extent of altering the character of the work; there was no hardship in such a provision, as if extras were ordered the contractors would get additional payment under condition 33 and an extension of time for completing the works under condition 28. This clause, he said, was preserved unaltered by the deed of variation (see clause 10 thereof) and he met the argument that a provision for unlimited modification which might be reasonable, when there was a provision for increased remuneration, became unreasonable when a maximum profit was fixed, by pointing out that under the revised contract the contractors got the benefit of a guaranteed minimum profit. The contractors, he said, were seeking to get rectification under the guise of construction.

He further argued that it would have been perfectly easy to cover expressly the event which the contractors were now seeking to cover by the implied term if the parties had intended any such term and that it was obvious to anyone who read condition 33 of the original contract that the event might arise. Finally, on this part of the case, he cited the passage about the "officious bystander" from the judgment of Mackinnon L.J., in *Shirlaw* v. *Southern Foundries* (1926) *Ld.* (1), which had been cited by Lewis J. in the court below. In the present case, said Mr. Rewcastle, it would be quite impossible to imagine the parties saying "of course" if the officious bystander had suggested the insertion of implied limit in the application of the maximum fixed by clause 4 of the deed of variation which the contractors now sought to introduce, for the Commissioners had rejected it when the contractors first raised the point in 1938, and the very nature of the work—the construction of an ordinance factory in time of emergency—made it unlikely that the Commissioners would ever have accepted it.

But, said Mr. Rewcastle, it was suggested that the learned judge was relying not on an implied term but on a principle supposed to be derived from *Bush* v. *Whitehaven Trustees* (2). If so, he misapplied that case. To appreciate this point it is important to see exactly what *Bush* v. *Whitehaven Trustees* (2) decides. In that case the plaintiff had entered into a contract with the defendants to construct a 15-inch water main from Ennerdale Water towards Whitehaven for 1,335*l*. The contract allowed for extras, the defendants were to give the plaintiff the use of so much of the site as might from time to time, in the opinion of their engineer, be required to enable them to commence and continue the work, but the contract contained this provision: "But the non-delivery "in the manner aforesaid of the use of such site or any part "thereof shall not vitiate or affect the contract nor any such "provision therein or in this specification contained, nor "entitle the contractor to any increased allowance in respect

---

(1) [1939] 2 K. B. 206, 227.

(2) (1888) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C. A.).

"of money, time or otherwise, unless the engineer may grant "him any extension of time, and then only to that extent "under the provisions for that purpose hereinafter contained." A time was fixed for completion, but the engineer had power to extend it. Time was made of the essence of the contract and penalties for delay were imposed. The plaintiff's tender was sent in on June 12, 1886, and he was given to understand that he was to begin at once and to have four months in which to finish the work, and his calculations were based on that footing, as the cost of doing the work in the winter months would be at least 50 per cent. higher than the tender. The contract was accepted on June 23 and the plaintiff was then told that arrangements for immediate possession had been made with five out of eight owners and five out of ten occupiers of the land necessary for the works. The plaintiff began work on July 12, before the corporation had sealed the contract; but the land was not all available until October 6. In consequence of this delay, the work was thrown into the winter months and the contractor was put to heavy extra expense for which he sued the defendants.

The action was tried before Cave J., with a jury, and a number of questions were left to the jury. Questions 1, 2, 5 and 8 and the answers thereto are as follows: "(1.) Was it "the duty of the defendants under the contract to be in a "position at the commencement of and at all times during "the contract to give the contractor the use of so much of the "site of the works as might, in the opinion of the engineer, be "required to enable the contractor to commence and continue "the execution of the works in accordance with the contract? "(A) Yes. (2.) Was the contract made upon the basis that "the defendants would be in a position to act as aforesaid? "(A) Yes." Then Question 5—and this is the important one: "Were the conditions of the contract so completely changed, "in consequence of the defendants' inability to hand over the "sites of the work as required, as to make the special pro- "visions of the contract inapplicable? (A) Yes." Then Question 8 is: "What damage has the plaintiff suffered by "reason of the inability of the defendants to hand over the "sites required for the purposes of this work? (A) 600*l.* over "and above the contract price."

It appears from the report of the case in 52 Justice of the Peace at page 392, that on these findings the judge found himself unable to reach a conclusion. The defendants,

C. A.
1949

PARKINSON (SIR LINDSAY) & CO. LD. v. COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS.

Cohen L.J.

therefore, moved before a Divisional Court that judgment should be entered for them with costs. The Divisional Court, however, directed judgment to be entered for the plaintiff for 600*l*. Lord Coleridge C.J. (1), states the question before the court as follows (as appears from the report in Hudson on Building Contracts) : " It is an action brought by a contractor " who has signed a contract, and who has undertaken to be " bound by the terms of that contract, to recover not only " the contract price, but to recover a sum of money either by " way of quantum meruit or by way of damages against the " defendants—it does not very much matter which view is " taken—to recover a considerable sum of money beyond the " contract price, on the ground that the circumstances under " which he completed the contract were wholly different from " those under which he entered into it, and that therefore he " is set free from the terms of it and has a right to recover this " sum of money." He first of all deals with the question whether a term could be implied for breach of which the plaintiff could recover damages and was inclined to answer it in the affirmative, but goes on to say that even if he was wrong on that point, there was another principle on which he thought the plaintiff was entitled to recover. He states that principle in these terms (1) : " Now, what is that principle ? " I find it stated in very clear terms in the judgment of " the majority of the court in *Jackson* v. *Union Marine* " *Insurance Co. Ld.* (2), and after going through a variety of " authorities, with which I need not now trouble myself, the " result is stated in this way : ' These authorities seem to " ' support the proposition, which appears on principle to be " ' very reasonable, that where a contract is made with " ' reference to certain anticipated circumstances, and where, " ' without any default of either party, it becomes wholly " ' inapplicable to, or impossible of application to any such " ' circumstances, it ceases to have any application ; it cannot " ' be applied to other circumstances which could not have " ' been in the contemplation of the parties when the contract " ' was made.' " He then proceeds to examine the facts of the case before him in the light of that principle. He points out that what was to have been a summer contract has been turned into a winter contract, saying (1): "It was turned "into a winter contract—into a contract when wages were "different, probably, or may have been; when days were "short, instead of long; when weather was bad, instead of "good; when rivers which had to be dealt with, and had to "be crossed by the pipes, were full not empty; and when "in fact, I will not say every circumstance, but a great many "most important circumstances under which the contract "was to be executed, had wholly changed from those which, "it is reasonable to suppose, were in the contemplation of "both the parties when the contract was entered into. The "contract, nevertheless, was carried on, and was completed. "It was carried on and was completed, of course, with the "knowledge of the contractor, and equally, of course, with the "knowledge of the defendants. The defendants knew as well "as the contractor that the work was being carried on under "totally different circumstances to those contemplated in the "contract. They knew that perfectly well, and although "the plaintiff possibly or probably might at the expiration "of the four months have thrown up the contract and refused "to proceed, he had also a perfect right, if he had thought fit, "with the knowledge and assent of the defendants, which "in this case is to be presumed and, indeed, was proved, to "go on with the contract and to complete it under the altered "conditions, or I will not say to complete the contract, but to "complete the work under the totally altered conditions that "had arisen." He then relies on finding 5 of the jury's finding to show that there was such a change of circumstances as to make applicable the principle he had stated.

---

(1) Hudson on Building Contracts (4th ed.), vol. 2, 122, 127.

(2) Ibid. 122, 127.

(3) (1873) L. R. 8 C. P. 572, 581 ; (1874) L. R. 10 C. P. 124.

Mathew J. agreed with this conclusion, saying (2)—I read from the penultimate sentence of his judgment: "It appears "to me there was abundant evidence to justify the conclusion "of the jury that the plaintiff and the defendants permitted "the works to go on upon the understanding that those works "were being done, not under the original contract, but under "a contract with altered conditions." This decision was affirmed by this court on the second ground stated by Lord Coleridge, the ground with which Mathew J. concurred.

Lord Esher M.R., said (3): "Now, the answer to the "5th question (if you take it to be a binding finding of the jury) "in my opinion, comes to this, that the condition of things

(1) Hudson on Building Contracts (4th ed.), vol. 2, 128.

(2) Ibid. 130.

(3) Ibid. 131.

" had so been altered after the making of the original contract " (they had been so greatly altered) that it was not reasonable, " or right, or fair, or just, to hold that the original contract " was made with regard to those circumstances. In other " words, you may put it thus, that the condition of things was " so altered that if they had been supposed to be the things " with regard to which the first contract was made, neither " party acting as (I must use my favourite phrase) reasonable " men of business could have made the original contract in the " terms in which it was with regard to that state of circum- " stances. The result of that, if it is true, is this, that the " original contract is made with regard to a different subject- " matter from the subject-matter which was dealt with by the " parties." Then later he says (1): " The one party goes on " to deal with the new state of circumstances and does work " with regard to those. The other party knows that that " party is dealing with that new state of circumstances and " allows him to do so. Therefore, the one does work which he " intends to be for the other. The other person allows him " to do that work, knowing that it is intended to be done for " him. It is work which he knows that the one party is doing " upon the terms of being paid for it somehow, and he allows " him to go on, with an understanding that he is to be paid for " it somehow. What does that give rise to? It gives rise to " a claim for a fair remuneration for that work done. That " fair remuneration is called in legal language a payment " according to a quantum meruit. If the first contract was " gone, if the state of cirucmstances with regard to which it " was made were really no longer in existence as between the " parties, if the one did work for the other upon the new state " of circumstances which the other accepted, knowing that " it was being done on the terms of being paid for, that gives " rise to a quantum meruit." To complete my citation, let me take a short passage from the judgment of Lindley L.J., where he says (2), that a state of things was assumed by both parties which was never realized, and that the contract was based on the supposition that the state of things assumed would exist.

It is said that the ratio decidendi of this case does not involve any implied term. I doubt whether that is correct. It seems to me at least to involve the implication of a term

---

(1) Hudson on Building Contracts (4th ed.), vol. 2, 121, 131.

(2) Ibid. 133.

C. A.

1949

PARKINSON (SIR LINDSAY) & CO. LD. *v.* COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS.

Cohen, L.J.

that the contractor shall not be bound to complete the work, if the assumed state of affairs did not exist and it certainly involves the implication outside the contract of a fresh contract to pay a quantum meruit for the work done by the contractor and accepted by the owner. Both Lord Esher M.R. and Lord Coleridge C.J., based their conclusion on the decision in *Jackson* v. *Union Marine Insurance Co. Ld.* (1). It will be convenient, therefore, to refer to that case before reverting to Mr. Rewcastle's argument. The actual question in that case was whether the insurance company were liable on an insurance of chartered freight, the charterers having thrown up the charter because the ship went aground on its way to the port of loading and was much damaged and was still under repair at the date of trial. The court held the charterers were absolved from loading the vessel and therefore the defendants were liable to the shipowner. The ratio decidendi is conveniently stated in a short passage in the judgment of Bramwell B., in the Exchequer Chamber, where he says (2): "In considering this question, the finding of the jury that "'the time necessary to get the ship off and repairing her so "'as to be a cargo-carrying ship was so long as to put an end "'in a commercial sense to the commercial speculation entered "'into by the shipowner and charterers,' is all important. "I do not think the question could have been left in better "terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties "contemplated had become impossible; that a voyage "undertaken after the ship was sufficiently repaired would "have been a different voyage, not, indeed, different as to the "ports of loading and discharge, but different as a different "adventure,—a voyage for which at the time of the charter "the plaintiff had not in intention engaged the ship, nor the "charterers the cargo; a voyage as different as though it had "been described as intended to be a spring voyage, while "the one after the repair would be an autumn voyage." Applying the principle of those decisions to the case before us, Mr. Rewcastle says that they show that the character of the adventure must be changed before a party can claim to be discharged from his obligation. He relies on the finding of the arbitrator that the quantity and value of the work executed was not different in character from that covered by the varied contract and says that the fact that it was largely in excess of the quantity and value of work the subject of the varied contract is not sufficient to make the principle of the cases cited applicable.

---

(1) L. R. 8 C. P. 572; 10 C. P. 125.

(2) L. R. 10 C. P. 125, at p. 141.

Sir Valentine Holmes, on the other hand, says that the principle established by these cases is that if the circumstances in which a contract is carried out differ so completely from the circumstances which were in the contemplation of the parties when the contract was made, that the parties cannot be taken to have intended to apply the provisions of the contract, or some of them, to the work as actually done, the provisions in question will not apply, and if such work has been done by one party at the request of the other party, for which no remuneration is provided under the contract as thus amended, the party doing such extra work will be entitled to payment therefor on a quantum meruit basis. He argued that the principle would have been applicable to the original contract. He relied on the observations of McCardie J., in *Naylor, Benzon & Co. Ld.* v. *Krainische Industrie Gesellschaft* (1), where the learned judge said (2): " It is essential to remember, however, " that words, even though general, must be limited to circum- " stances within the contemplation of the parties." He referred to various provisions in the contract document and in particular to the note to item 57 in the first bill of quantities which, though not contractual in character, was, he said, an indication that the parties contemplated work of the value of approximately 4*l.* million, namely, 3½*l.* million mentioned in paragraph 1 of the original contract and ½*l.* million mentioned in the note ot item 57. He said that an increase in the amount of work ordered might be so great as plainly to amount to a complete change of the circumstances contemplated by the parties and thus bring the principle of *Bush* v. *Whitehaven Trustees* (3) into operation. The question, he said, when that point was reached must really be a question of fact, and para. 2 of the arbitrator's award really amounted to a finding in his favour on this point.

But, said Sir Valentine, whatever be the position on the original contract, the varied contract made it plain that the parties were proceeding on the basis of work represented by the original contract price of approximately 3½*l.* million and the allowance of approximately ½*l.* million for extras. His argument continued on the following lines: (1.) on any other basis completion of the contract by January 30, 1939, would be impossible. Not only did the recitals in the deed of variation show that this was the object of the parties, but the contractors had been called upon for a time and progress report, and had informed the Commissioners early in August, 1937, that completion by January 30, 1939, would be possible if the abnormal methods were adopted; (2.) it is inconceivable that the contractors would have agreed to a limit of profit of 300,000*l.* if the Commissioners were to have the right to tie up their men and equipment for an indefinite period by calling for extras to an unlimited amount under condition 33; (3.) the upper and lower limits of profit must have been calculated on some basis. This basis was 3 per cent. and 6 per cent. on an estimated cost of 5*l.* million made up as to 3½*l.* million of the original cost price of the work, as to ½*l.* million of the original estimate of extras and as to 1*l.* million of the estimated cost of adopting the exceptional methods referred to in the penultimate recital to the deed of variation. The arbitrator had found that the maxima and minima in the subsidiary contracts were based on 3 per cent. and 6 per cent. of the cost or estimated cost of the work involved in those contracts and it was a reasonable inference that the maximum and minimum in the deed of variation were fixed on the same basis; (4.) Clause 8 of the deed of variation would be unworkable unless " the whole of the work " was an ascertained sum.

---

(1) [1918] 1 K. B. 331.

(2) Ibid. 335.

(3) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C. A.).

Mr. Rewcastle said that this argument was based on a misconception of clause 8 and on a number of assumptions unsupported by findings of the learned arbitrator; in particular he stressed the fact that the learned arbitrator had stated that there was no evidence enabling him to find what was the state of the mind of the Commissioners at the date of the deed of variation. As regards clause 8, he said that if Sir Valentine Holmes was right, all that the draftsman of the clause need have done would have been to provide that each payment should be of an amount equal to 3 per cent. of the cost of the work comprised in the relevant architect's certificate and that the clause is quite workable if " the whole of the work " is read as meaning the whole of the work ordered at the date of the certificate. There is some force in this criticism, but clause 8 is not essential to Sir Valentine's argument on the varied contract. As regards the criticism that the arbitrator had found himself unable to make a finding as to the state of mind of the Commissioners, I think the arbitrator was merely saying that as the Commissioners had chosen to call no evidence, he had no direct evidence as to their state of mind. I think he failed to appreciate that it was open to him to draw inferences from the facts deposed to before him and the documents in the case. As he failed to do so, it was, I think within the province of the learned judge and is within our province to draw such inferences as are justified by the arbitrator's findings and the documents.

Looking at the matter as a whole, I have come to the conclusion that whatever might have been the position had the contract not been varied, Sir Valentine's argument that both parties entered into the varied contract on the basis that the work to be comprised therein would be the work covered by the original estimate of 3½*l.* million and ½*l.* million, is well founded. How could the parties have arrived at the conclusion that the work could be done by January 30, 1939, by the use of the exceptional methods if they had not in their minds an estimate of the work to be done? Knowing that this had originally been estimated at approximately 4*l.* million and knowing that this was the basis on which the contractors were proceeding, is it not a reasonable inference that the Commissioners were contracting on the same terms?

Mr. Rewcastle said there was no evidence that the Commissioners had estimated or accepted the contractors' estimate of 1*l.* million as the cost of the exceptional methods. As no evidence was adduced to suggest that any part of the excess cost of the work ultimately executed was attributable to the exceptional methods, I do not think it is of vital importance to determine whether or not the Commissioners agreed the figure of 1*l.* million. But I think the proper inference is that they did. I agree with Sir Valentine's argument based on the minimum and maximum amounts fixed by clause 4 of the deed of variation that these must have been calculated on a figure of 5*l.* million which included therefore an estimate of 1*l.* million for the cost of the exceptional methods.

In the result I am of opinion that Lewis J. was right in his conclusion that the principle of *Bush* v. *Whitehaven Trustees* (1) is applicable to this case. The work executed so far exceeded

(1) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C. A.)

the stipulated work, that is to say, the work comprised in the original estimate of 4*l.* million that it seems to me, to use Mr. Rewcastle's language, fantastic and absurd to suppose that such a large increase as in fact occurred was within the contemplation of the parties when the deed of variation was executed. We are, I think, amply justified (*a*) in reaching the conclusion that the basis of the varied contract was that the quantum of work which the Commissioners were entitled to require was work measured approximately by the said sum of 5*l.* million; and (*b*) in implying a term that the Commissioners should not be entitled under the contract to require work materially in excess of that sum. It follows that such excess work having been done by the contractors at the request of the Commissioners, the Commissioners are liable to pay the contractors reasonable remuneration therefor.

I was at one time inclined to think that the result of the application of *Bush* v. *Whitehaven Trustees* (1) should have been to answer the arbitrator's first two questions in the negative and the third question in the affirmative, thus making the quantum meruit basis applicable throughout, but Mr. Rimmer referred us to the decision in *Pepper* v. *Burland* (2), which supports an award of the contract price for the work within the contract and a quantum meruit for the excess. In the result I am of opinion that the appeal fails and should be dismissed with costs.

ASQUITH L.J. I agree. The question in this appeal is whether the original contract between the parties, as varied by the deed of August 18, 1937, is to be read as producing this extraordinary result, namely, first, that in no circumstances may the contractor's profit exceed 300,000*l.* but, secondly, that nevertheless, after he has earned that profit, the Commissioners are entitled to require him to perform further additions and variations till the end of time, without paying him an extra penny in respect of them. For brevity, I will call such variations and additions "extras." I propose to consider, in its bearing on this problem, first the construction of the original contract and, secondly, the effect of the superimposition on it of the deed of August, 1937.

---

(1) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C. A.).

(2) (1791) Peake 139.

Under general condition 33 of the original contract, read literally, the Commissioners were entitled to require the contractor to carry out " extras " wtihout limit of quantum or time. They could require him to erect a series of buildings on the site, pull them down, and put them up again, with or without alterations, as often, and for as long, as they chose. When the original contract alone was concerned, this was not such an unreasonable stipulation as on its face it appears, since two factors would in practice militate against the abuse by the Commissioners of their strict legal rights. First, under that contract they would have to pay for all extras under either sub-clause (*a*) or sub-clause (*b*) of condition 35 and, secondly, pay for them out of public funds. The contractor might feel some legitimate confidence that, whatever their strict rights, the Commissioners would not in practice choose, or perhaps in a democratic country be allowed, to waste the taxpayers' money wantonly. A further consideration suggests some doubt whether such a course of conduct would even be within their strict legal rights. There is a note to item 57 of the first bill of quantities. (The bills of quantities are among the documents in which the original contract was embodied.) The note in question, which my Lord has read, but which I will repeat, reads as follows : " It is probable that " further work to the value of approximately 500,000*l*. will " be ordered on a measured basis under the terms of the " contract." So far as the original contract is concerned, it is not suggested that this note was per se a term of that contract, in the strict sense that the Commissioners were undertaking to order not less or not more than about 500,000*l*. by value of " extras." The very words " it is probable " rule out any such construction, for they necessarily imply that, in less probable events, the Commissioners may order less (or more) than this quantum of extras, a possibility which would not exist if they were not entitled to do so. It was, however, suggested that the presence of this note is indirectly relevant as supporting an implied limitation of the literal scope of condition 33, a limitation to extras on some such scale as 500,000*l*., and at all events precludes so literal a reading of condition 33 as would entitle the Commissioners to require extras to be carried out to the tune of, say, 100,000,000*l*. or indeed 2,000,000*l*. It is not necessary to decide this point. If it were, I should for myself feel serious doubt whether any such limitation could validly be implied.

When, however, the original contract is read subject to the overriding effect (where the two are inconsistent) of the deed of August, 1937, the case for reading condition 33 as subject to an implied restriction on its literal tenor is much stronger. Two new considerations here intervene, the first derived from the terms of the deed itself; the second derived from the circumstances which surrounded and led up to its execution. To deal with these in turn, first, if the original contract plus the deed are read without any implied limitation on their literal meaning, the result, as indicated above, is that after 300,000*l.* profit has been earned by the contractor, he can be compelled to labour like the Danaids without reward or limit, on any further "extras" which the Commissioners may elect to exact from him, "till the last syllable of recorded time." The restraining practical factor that such "extras" will have to be paid for, and paid for out of the taxpayers' funds, no longer operates, because of the proviso to clause 4 of the deed imposing a maximum profit. Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other. Where the language of the contract is capable of a literal and wide, but also of a less literal and a more restricted, meaning, all relevant circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it.

What, if any, then, were in the present case the relevant circumstances at the time when the varying deed was executed? They include the following: (*a*) Owing to the default of the Commissioners, the contractor had by August, 1937, become entitled to an extension of time beyond January 30, 1939, the date fixed for the completion of the work by the original contract. The Commissioners were most anxious that he should not enforce his right to any extension.

(*b*) Early in August the contractor informed them that it would be possible to complete by the original date if certain time-saving but uneconomic methods were adopted. The main object of the varying deed was to commit the contractor to their adoption. In passing, it is to be noted that (subject to their adoption) the contractor felt he could give an assurance that he would complete by a specific date. It is hard to see how he could give such an assurance unless he at least contemplated a more or less fixed quantum of work, ascertained at the time when the assurance was given. He certainly could not give it if he contemplated a quantum indefinitely expansible at the option of the other contracting party.

(*c*) The quantum of work originally contemplated as that which the contractor could or was likely to be called on to perform was (i.) work valued at bills of quantities prices at 3½*l.* million, plus (ii.) extra work which was thought likely to work out, at the same prices, at roughly half a million pounds. The bills of quantities prices were to be adjustable if and so far as wages and the price of structural steel rose or fell, but this does not affect the quantum of the work; it merely affects its measure in money.

(*d*) If the "uneconomic devices" were applied, this same quantum of work would cost an additional sum estimated by the contractor at 1,000,000*l.* I will call this quantum by the name given to it in the points of claim, "the stipulated work." The money measure (if we adopt the contractor's estimate of the cost of the uneconomic devices) of "the stipulated work" was thus in August, 1937, almost exactly 5,000,000*l.*, if the uneconomic devices were adopted; almost exactly 4,000,000*l.* if they were not.

(*e*) When the deed came to be drawn, it provided for a "floor" and a "ceiling" to the contractor's profit. His guarantee minimum profit was to be 150,000*l.*; his maximum 300,000*l.* This first figure is precisely 3 per cent. on 5,000,000*l.*; the second precisely 6 per cent.

(*f*) On August 11 or 12, 1937, a few days before the deed was signed, Colonel Parkinson had a conference with Sir James West, chief architect to the Commissioners, the result of which is confirmed in a letter of that date by the Commissioners to the contractor, which letter names these two figures as minimum and maximum profit respectively.

(*g*) The arbitrator says there was no evidence enabling him to determine what the Commissioners, as opposed to the contractor, contemplated as to the quantum of work, if any, to be performed in excess of the stipulated work under the contract as varied, whether, for instance, the Commissioners had in mind a fixed total of work measured within a narrow margin by the sum of 5,000,000*l.*, and whether they concurred in the contractor's estimate of 1,000,000*l.* (one element in building up the 5,000,000*l.*) as the extra cost referable to the "uneconomic devices." By saying there was "no evidence," in my view, the arbitrator meant no more than that, Colonel Parkinson at the time of the arbitration being dead and Sir

James West not being called as a witness, he had no direct oral evidence showing what the Commissioners contemplated under these heads immediately before the execution of the deed. It seems likely that the arbitrator, mistakenly, supposed he must limit his powers to facts proved by direct oral evidence and was disabled from drawing inferences of fact. This court, at least, is under no such disability and in drawing such inferences is not disturbing any finding by the arbitrator, but merely filling a blank which he could, and perhaps should, have filled.

(*h*) I am much impressed by Sir Valentine Holmes' argument that when the figures of 150,000*l.* and 300,000*l.* emerged—first in the Commissioners' letter of August 12, 1937; then in the deed itself—they were not presumably, as he put it, "drawn from a hat." It seems overwhelmingly probable that they would be related to some basic figure as percentages. They happen to form precise percentages of 5,000,000*l.*, a figure which was clearly in the mind of the contractor as measuring the quantum of the work he had to carry out—the "stipulated "work."

(*i*) If so, it seems also overwhelmingly probable that in the interview or interviews leading up to the deed this 5,000,000*l.* figure was communicated to and accepted by the Commissioners as the basis of the minimum and maximum profit figures agreed on in the deed. The parties at these interviews must have discussed why the contractor should receive these sums and not some others, and their precise mathematical relationship to 5,000,000*l.* cannot be a miraculous coincidence. I should draw the same inference from the terms of the deed itself, viewed in the light of the surrounding circumstances, even if the letter of August 12, were entirely excluded from consideration.

If so, the conclusion seems justified that the parties to the varying deed contracted on the basis of a maximum and minimum profit directly related and limited to a total quantum of work measured approximately by 5,000,000*l.* and on the basis that the Commissioners should not be entitled under the contract to require work materially in excess of this quantum. Hence no claim to exact an extra quantum of work measured by about 2,000,000*l.* can be sustained under the contract and, such extra work having been in fact requested and performed, the contractor is entitled to claim in respect of it, not under the contract, but dehors the contract, for a reasonable remuneration.

Many authorities were cited to us on the construction of the contract as varied by the deed. The majority of these were decisions on "frustration." Frustration cases differ from the present case, in so far as in many of them a catastrophic event is involved. A catastrophic event, caused by the act of neither party, intervenes, destroying some basic, though tacit, assumption on which the parties have contracted, and along with that assumption destroying the contract itself. In the present case there is no such external event, for the Commissioners' act in demanding 2,000,000*l*. worth of "extras" cannot be regarded in that light and is in any case the act of one of the parties. The ground common to this case and frustration cases—the area of overlap between them—is limited to this, that in many frustration cases a stipulation absolute, if literally construed, has been construed as subject to an implied restriction by reason of the circumstances surrounding the formation of the contract and contemplated by the parties at that time; and it is sought in the present case by the contractors to import a similar implied restriction. In a frustration case "X" may contract to sing in the Albert Hall on Tuesday, and the obligation, if read literally, is unconditional, yet the contract is construed as subject to an implied term that the Albert Hall shall not have been burnt to the ground on the previous Monday. The continued existence of the Albert Hall was a basic assumption, only not expressed in the contract because the parties thought (or would have thought if they had considered the point) that it was too obvious to need expressing.

So again where an obligation is subject to a clause modifying its incidence in certain named events, such a clause may itself have to be construed against its literal tenor if the literal construction runs counter to some similar basic assumption. A contract often provides that in the event of "delay" through specified causes, the contract is not to be dissolved, but merely suspended, yet such a provision has been held not to apply where the delay was so abnormal, so pre-emptive, as to fall outside what the parties could possibly have contemplated in the suspension clause. In other words, "delay," though literally describing what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind.

Metropolitan Water Board v. *Dick Kerr & Co. Ld.* (1), is a good illustration of this. Dick Kerr & Co. Ld. contracted in July, 1914, to build a reservoir for the Water Board within six years, with a proviso that if, by reason of any "difficulties "impediments, or obstructions whatsoever and howsoever "occasioned the contractors should, in the opinion of the "engineer, have been unduly delayed or impeded in the completion of the contract," it should be lawful for the engineer to grant an extension; in other words, such a delay should neither dissolve the contract nor leave it unaffected, but should suspend its execution. In February, 1916, the Ministry of Munitions required the company to cease work on the contract, thereby making its further performance temporarily illegal. It was held that the provision for extending the time did not apply to the prohibition of the Ministry; that the prohibition was of such a character and duration as to have made the contract when resumed a different contract from the contract broken off. Such a prohibition beyond question fell literally within the designation "all difficulties, impediments, or obstructions "whatsoever and howsoever occasioned." It was both a difficulty, an impediment and an obstruction, and it was occasioned somehow; yet it was held that the parties who framed that provision did not and could not have contemplated an interruption of so extreme a nature, and the provision was read as impliedly excluding it. (Compare also *Distington Hematite Iron Co. Ld.* v. *Possehl & Co.* (1).)

---

(1) [1918] A. C. 119.

The famous case of *Jackson* v. *Union Marine Insurance Co. Ld.* (2), illustrates the same process, namely, a restriction imposed on the literal scope of the language actually used by the parties, by implication from what they must have contemplated. In that case a ship was bound under a charterparty to sail in February for Newport "with all convenient "speed . . . . accidents of navigation excepted." She was stranded on her way to the loading port and was under repair until August—seven months in all. There had nevertheless been no breach of the charter-party by the owners, for the ship had proceeded "with all convenient speed" towards Newport and had only not arrived there because of an "accident of navigation." On a literal construction of the contract, it should still have been open to and obligatory on the owners to perform the chartered voyage in August, but it was held that the seven months' delay would have turned a spring voyage into an autumn voyage, that the parties had contemplated a spring voyage only—this was the basic unexpressed assumption—and that the owners could not claim, nor could the charterers require them, to perform something wholly different in quality, namely, an autumn voyage. A sufficient delay may convert the stipulated adventure into something else, something unstipulated and dehors the contract.

---

(1) [1916] 1 K. B. 811.

(2) (1873–4) L. R. 8 C. P. 572; 10 C. P. 125.

I pass from *Jackson's* case (1) to *Bush* v. *Whitehaven Trustees* (2), which is a convenient bridge between the frustration cases and the present one. In *Jackson's* case (1), as just indicated, an uncontemplated turn of events altered the character of a voyage from that of a spring to an autumn voyage. In *Bush's* case an uncontemplated turn of events converted a summer building contract into a winter building contract. In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way. Indeed, in *Bush's* case the contract appeared, on a literal construction, to make express positive provision for the legal consequences of the very event which in fact changed the contract from a summer to a winter one. The event in question was the failure of the defendants to make available the whole of the site, on which the plaintiffs were to erect certain works, in time for the plaintiffs to erect those works during the summer months. The contract, by clauses 11 and 22, read literally, provided that the non-delivery of the site in time to enable the contractor to "commence "and continue the works" should not vitiate the contract, nor entitle the contractor to anything except an extension of time (at the discretion of the engineer) which would enable him to avoid the liquidated damages assessed by cl. 23. It was held, however, that these clauses, though literally applicable, did not apply to a delay in providing the site so extreme as to throw the work from the summer into the winter months and so to revolutionize its character. The works were thrown into, and in fact carried out in, the winter, and the contractor succeeded in a claim to extra payment,

(1) (1873–4) L. R. 8 C. P. 572; 10 C. P. 125.

(2) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, 122 (Div. Court and C. A.).

based in the alternative on a quantum meruit or a breach of the contract. The basis on which he succeeded was that none of the work he did was done under the contract, and that he was entitled to payment of reasonable remuneration for the work he had actually done under conditions of greater expense. He had in fact been paid at contract rates and, credit being given for those payments, recovered 600*l.* in excess.

In the case now under appeal, as in some of the cases just reviewed, the contractual documents contain terms capable literally of a very wide meaning. The varying deed speaks of the "works," and by its tenth paragraph saves so much of the original contract (including the general conditions) as is consistent with its own terms. No. 1 of the general conditions defines the work as "the work indicated on the drawings and/or "described in the specifications and/or bills of quantities, "including all modified extra or additional works and all "obligations performed under the contract." Condition 33, again read literally, gives the Commissioners the right "at "their absolute discretion" to "modify the extent, character, "quantities or dimensions of the work shown or described in "the contract," and generally to require the contractor to perform extra work without any express limit as to its quantum or even its character. Literally, therefore, the "work" in the contract as varied includes an unlimited quantity of "extras." But, for the reasons given above, I think the contract as varied should not be construed according to its literal tenor, having regard to the circumstances surrounding the execution in particular of the deed of August, 1937, and the implications, in the light of those circumstances, of the sums of 150,000*l.* and 300,000*l.* expressed in it. In the result, the quantum of work exigible, including extras, is measured by 5,000,000*l.* roughly, the extras constituting about 500,000*l.* worth, at bill of quantities prices, of this total. Some margin above this may be taken as contemplated and covered, but anything resembling 2,000,000*l.* worth of "extras" over and above this is, in my view, impliedly excluded from the contemplation of the parties and the scope of the contract.

I therefore agree with the order proposed.

Singleton L.J. It seems to me clear that the work which was contemplated at the time at which the deed of variation was executed on August 18, 1937, was that which was to be executed under the original contract and perhaps 500,000*l.*

extra work which might be required. It was realized that the introduction of exceptional methods and uneconomic working adopted in the interests of speedy completion would add to the cost and the contractors' estimate of the increased cost likely to be incurred thereby was 1,000,000*l*. (See the Award, 1 (*k*), and further finding No. 4.) The contractors considered that they could complete by January 30, 1939, by adopting these methods of working, and it would appear that they could have done so had it not been that additional work was ordered. In course of time the Commissioners ordered work to be executed greatly in excess of that contemplated at the date of the contract or of the deed of variation. The result of this was two-fold; (*a*) the works were not completed until a year beyond the time contemplated—and this without any suggestion of delay against the contractors—and (*b*) the cost was very much higher than had been anticipated originally. Valued according to condition 35 (*a*), the executed work amounted to 6¼*l*. million, as against 3½*l*. million contemplated, plus perhaps half a million pounds extras and additions. Valued according to condition 35 (*b*), the work amounted to nearly 7½*l*. million. The actual cost to the contractors (using exceptional methods) was 6,683,056*l*., which amount has been paid to them, along with 300,000*l*., the maximum profit under cl. 4 of the deed of variation. The contractors are dissatisfied. They claim that they are entitled to a further payment. They say that the agreement as to the 300,000*l*. maximum profit was on the basis that the work to be executed by them was approximately 5*l*. million, made up in this way: 3½*l*. million, the original contract figure, 500,000*l*. contemplated extras, and 1*l*. million extra cost through the introduction of exceptional methods. They say that it was in the contemplation of both parties, that the work would be covered by this 5*l*. million, whereas, by reason of the additional work ordered, it was 7½*l*. million. They raised the question as the work went on. Para. 8 of the further findings of the arbitrator is: "The contractors by letter "dated November 5, 1938, to Sir James West claimed that "they were being called upon to execute more work than was "contemplated by the varied contract and that they were "entitled to extra remuneration for work in excess of the "'stipulated work.' In the said letter the contractors "informed Sir James West that they did not anticipate that "their cost of finishing the work (without profit remuneration) "would be less than 6,000,000*l*. on the basis that no further "new works would be ordered before completion." Para. 9 of the further findings is: "The said letter of November 5, "1938, was referred by the said Sir James West to the Com-"missioners of Works when after certain informal discussions "one Goodale on behalf of the Commissioners by letter of "July 12, 1939, refused to recommend any increased payment "to the contractors stating that at the time the agreement "of August 18, 1937, was entered into the full character and "extent of the work could be and was no doubt clearly appre-"ciated by the contractors." Para. 10 is: "Following the "said letter of July 12, 1939, the contractors proposed to "suspend all work (except that covered by the subsidiary "contracts mentioned in para. 1 (*n*) of my award of August 22, "1947) unless they were paid additional remuneration. The "contractors continued with the work on the understanding "that their claim for additional remuneration would be "referred to arbitration." I am bound to say that I do not see anything to bear out the statement of Mr. Goodale in the letter of July 12, 1939. It does not appear to me as though anyone thought at the time of the deed of variation that there was any likelihood of anything like the additions which were called for later.

The claim of the contractors went to arbitration and the award was stated in the form of a special case. Further findings of fact, following a reference back, are before the court. The judgment of Lewis J., was in favour of the contractors. He held that they were not limited to the figure of 300,000*l*. profit, but that they were entitled to a further payment on the ground that they had been called upon to execute, and had executed work which was not within the contemplation of the parties at the date of the deed of variation. Mr. Rewcastle, on behalf of the Commissioners, attacks that judgment. He submits that the contractors were bound by the terms of the contract, as varied, and that they are not entitled to more than 300,000*l*. maximum profit as provided by cl. 4 of the deed of variation. The contract, he claimed, was as elastic as a contract could be, and the Commissioners were entitled to order any extras, or variations, or additions, so long as the work was of the same character and on the same site, and the profit payable to the contractors was fixed. The submission of Sir Valentine Holmes to the contrary is that the additional work, the cost of which was over 2*l*. million, was entirely outside the contract, that it was not within the contemplation of the parties at the time of the deed of variation when the agreement as to maximum profit was made, and that, the contractors having done this work, they are entitled to remuneration in respect of it.

If one had to consider this matter on the original contract alone, the contractors' difficulties would be almost insurmountable. The Commissioners were entitled to call upon them to carry out additional works or alterations and payment for any such works would have been based on the prices in the bills of quantities, which included profit or remuneration for the contractors. The deed of variation introduced an entirely different method of payment. All cost incurred by the contractors had to be paid and a minimum profit was guaranteed and a maximum profit was stipulated. At the time this arrangement was made, both parties had in mind work which could be completed by January 30, 1939. I cannot think that the Commissioners, or their advisers, thought that there would be any material alteration beyond the 500,000*l.* mentioned in item 57 of the bill of quantities No. 1. If there had been any thought of material increase at that time, surely there would have been something said about it. As the arbitrator found, the object of such a note as that to item 57 is to place the contractors in a position to gauge the probable ambit of the contract and to price the bills of quantities accordingly, having particular regard to the time required for completion.

I regard the time factor as of great importance. A thrust was being made to have the work completed (using exceptional methods) by January 30, 1939. The additional work which was ordered subsequently, and which was executed, meant that the work could not be completed until early in the year 1940. In other words, the contractors were occupied a year longer on the work than was contemplated and a year longer than they would have been but for the additional work ordered. The arbitrator finds that the contract time of two years for completion was not sufficient in which to execute the excess quantity of work in addition to the quantity of work in the varied contract. He further states that it is a well recognized usage in the building industry to relate profit remuneration to the actual or estimated cost of the work and to the time required to execute the work. The Commissioners (through their advisers, as shown on page 1 of bill of quantities No. 1) must have been well aware of this usage, and both parties had in contemplation work which could be completed by January 30, 1939. At the date of the deed of variation there had been nothing to indicate that the contractors would be called upon to execute work which would exceed the stipulated work as defined in para. 8 of the points of claim. Indeed, they had been called upon to supply a complete time and progress schedule of the work to be carried out, and early in August, 1937, they had informed Sir James West that it would be possible to complete the work by January 30, 1939, if exceptional methods were used.

The arbitrator finds expressly that when the contractors entered into the deed of variation and agreed to a maximum profit, they did not know, and had no reason to believe, that the ultimate quantity of work would or might be greater than the stipulated work, and further that the extent of the work which they were ultimately called upon to execute was not, and could not have been, appreciated by them. In his further findings of fact (para. 4) the arbitrator concludes that the contractors, on the information available to them in August, 1937, estimated that the cost of the work would be 4*l.* million plus 1*l.* million estimated cost of the exceptional or abnormal methods of working to be adopted to secure completion by January 30, 1939. He adds that there was no evidence enabling him to answer the question as to whether or not the Commissioners had in mind any different estimate at the time. It is submitted by Mr. Rewcastle that this defeats the claim of the contractors, in that there is no finding by the arbitrator of a figure which was in the contemplation of both parties. It is, I think, unfortunate that no document in relation to the discussions of August, 1937, was disclosed by the Commissioners. I find it difficult to imagine that there could be discussions as to maximum or minimum profit amounting to 300,000*l.* or 150,000*l.*, as the case might be, without a memorandum of some kind. No one was called on behalf of the Commissioners.

In the case of certain subsidiary contracts, the minimum and maximum profits were based on 3 per cent. and 6 per cent. respectively of the cost or estimated cost of the work involved. The case for the contractors was that the 150,000*l.* and 300,000*l.* figures were arrived at in the same way, namely, 3 per cent. and 6 per cent. on 5*l.* million. I find it difficult to resist this conclusion. No one agrees in advance figures of profit of this nature without some basis on which to work. It would have been easy for someone to have been called on behalf of the Commissioners, if there was any doubt as to this. Col. Parkinson who had negotiated on behalf of the contractors had met with his death before the arbitration. I was impressed, too, by the argument based on cl. 8 of the deed of variation, though it may be that the clause is open to more than one construction. I find myself unable to agree with the submission of Mr. Rewcastle that, under the contract as varied by the deed of variation, the contractors would have been bound to continue making alterations and additions, if ordered, for years and years, without any extra payment by way of profit. That would have led to manifest absurdity and injustice, as Mathew J. said in *Bush* v. *Whitehaven Trustees* (1). There must be a limit. I think that Lewis J. drew the right inference and that it was an inference which he was entitled to draw, namely, that at the date of the deed of variation both parties contemplated work which, with the introduction of exceptional methods, would cost approximately 5*l.* million, and that it was on that basis that the maximum profit was agreed at the figure of 300,000*l.* The additional work called for and executed later was something outside the contemplation of the parties in August, 1937. The contractors executed it at the request of the Commissioners, and they are entitled to be paid a reasonable profit or remuneration in respect of it. I would dismiss the appeal of the Commissioners.

Appeal dismissed.

Solicitor for the Commissioners: *The Treasury Solicitor.*
Solicitors for the contractors: *J. H. Lambert & Co.*

(1) 52 J. P. 392 (Div. Court); Hudson on Building Contracts (4th ed.) vol. 2, at p. 122 (Div. Court and C. A.).

C. G. M.

atement, at p. 680, *corrected*. R. *v*.
EPUTY RECORDER OF WOLVERHAMP-
ON. [1951] 1 All E.R. 627.

C. C. A.

1949
June 20, 21;
July 11.

Lord Goddard C.J.
Streatfeild and Devlin JJ.

REX *v.* H. SHERMAN LD.

Criminal law—Charge against incorporated company—Indictable offence—Purported verbal committal for trial by magistrate—Subsequent written order by magistrate empowering prosecutor to prefer bill at Assizes—Bill signed by clerk of assize before order drawn up—Indictment bad—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 33—*Administration of Justice (Miscellaneous Provisions) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 1.

When, as the result of proceedings before an examining magistrate against a corporation in respect of an indictable offence, an order is made by the magistrate pursuant to s. 33 of the Criminal Justice Act, 1925, empowering the prosecutor to prefer a bill to assizes against the corporation in respect of the offence named in the order, it is essential that such order should be in writing, drawn up under the hand of the presiding magistrate and bearing the seal of the court, and, since the bill presented by the prosecutor becomes a bill of indictment when signed by the clerk of assize, it is the duty of the latter, in any case in which it is proposed to indict a company, to satisfy himself, before signing the bill, that a proper order has been made by the magistrate.

APPEAL against conviction.

An information was preferred against a company, H. Sherman Ld., who carried on the business of bookmakers at Cardiff, charging them under s. 1 of the Betting Act, 1853, with having used an office in their premises at Cardiff for the purpose of betting with persons resorting thereto, and also with having used it for the purpose of money being received there in respect of bets on horse races. Two employees of the company were charged with aiding and abetting the company in the offences alleged against them. At the conclusion of the hearing before him, the stipendiary magistrate stated that he committed all the defendants for trial at the Glamorgan Assizes. A bill of indictment was preferred by the prosecution, and the day before the case came on for hearing at the assizes the solicitor for the company asked the clerk to the magistrate whether in the case of H. Sherman Ld. an order had been made by the magistrate pursuant to s. 33 of the Criminal Justice Act, 1925 (1), empowering the

---

(1) Criminal Justice Act, 1925, s. 33, sub-s. 1: "Where a "corporation is charged, whether "alone or jointly with some "other person, with an indictable "offence, the examining justices "may, if they are of opinion "that the evidence offered on the "part of the prosecution is "sufficient to put the accused

C. C. A.
1949
Rex
v.
H.
Sherman
Ld.

prosecution to prefer a bill at the assizes in respect of the offence charged against the company. He was informed that no order had been made by the magistrate. On the day of the hearing, before the arraignment of the appellants, but after the bill of indictment had been signed by the clerk of assize pursuant to s. 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the magistrate drew up an order in compliance with the requirements of s. 33 of the Criminal Justice Act, 1925, and antedated it to January 25, 1949, the day on which the hearing before him took place. On the appellant company being arraigned, objection was taken on their behalf that the indictment against them was bad for the reasons that a committal order could not be made against a corporation and that the provisions of s. 33 of the Criminal Justice Act, 1925, had not been complied with in that, at the time when the bill of indictment was signed by the clerk of assize, there was not in existence an order by the examining magistrate empowering the prosecutor to present a bill and consequently no bill could be preferred. The trial judge overruled the objection and the case proceeded to trial against all the defendants with the result that they were convicted and fined. They appealed against their conviction and on the hearing of the appeal a preliminary point was taken on behalf of H. Sherman Ld., that the indictment against them was bad.

Beyfus K.C. and *Roderic Bowen* for the appellant company. The indictment against H. Sherman Ld. was bad and the conviction should be quashed. It was held in *Rex* v. *Daily Mirror Newspapers Ld.* (1) that a limited company could not be committed for trial since it could not be sent to prison or held to bail. Following that decision, the Criminal Justice Act, 1925, was passed which in s. 25 provided that when proceedings were taken against a company for an indictable offence the magistrate might make an order empowering the prosecutor to prefer to the grand jury at assizes or quarter sessions, a bill in respect of the offence named in the order,

---

"corporation upon trial, make "an order empowering the "prosecutor to present to the "grand jury at assizes or "quarter sessions, as the case "may be, a bill in respect of the "offence named in the order, "and for the purpose of any "enactments referring to committal for trial (including this "Act) any such order shall be "deemed a committal for trial."

(1) [1922] 2 K. B. 530.

and that such order should be deemed a committal for trial. Grand juries were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1933, and the procedure under that statute is that when a bill has been preferred and has been signed by the proper officer of the court it becomes an indictment and is proceeded with in the same manner as if it had been found by a grand jury. Section 2, sub-s. 2, provides that no bill charging an indictable offence shall be preferred unless there has been a committal for trial or the bill has been preferred by the direction or consent of a judge, or pursuant to an order made under s. 9 of the Perjury Act, 1911. In the present case none of those requirements was complied with. There was no equivalent of a committal of the company since at the time the bill of indictment was signed by the clerk of assize, no order had been made by the magistrate empowering the prosecutor to prefer a bill, and consequently the clerk of assize was not entitled to sign the bill and no indictment could be preferred against the company. There would have been no objection to the magistrate making his order some time after he had given his decision in court, but it is submitted that there must be in existence a properly drawn up and authenticated order before the clerk of assize is entitled to sign the bill of indictment, which thereupon becomes the indictment. The judge at the trial took the view that the oral statement of the magistrate that he committed all the defendants for trial was the equivalent to making an order empowering the prosecutor to present a bill at assizes. In so ruling it is submitted that he was wrong and the conviction should, therefore, be quashed.

Arthian Davies K.C. and *M. Evans* for the Crown. There was no evidence as to the time when the order of the magistrate was actually made, but assuming that it was not made until after the bill of indictment was signed by the clerk of assize, the indictment against the company was still good. There is no provision in s. 33 of the Criminal Justice Act, 1925, that the order of the magistrate must be in writing and the magistrate's oral statement that he would commit the defendants was a sufficient compliance with the terms of the section. Further, the section does not say when the order is to be made but, conceding that it must be made in writing, it is submitted that the magistrate may make the order at any time up till the arraignment of the accused.

C. C. A.

1949

REX
v.
H.
SHERMAN
LD.

[LORD GODDARD C.J. The clerk of assize should not have signed the bill without having the order of the magistrate before him when he did so.]

The bill here was signed before the arraignment, and at that time there was before the court an order by the magistrate which purported to have been made on January 25, 1949.

LORD GODDARD C.J. In this case the appellant company was indicted at the Glamorgan Assizes in respect of certain offences against the Betting Act, 1853. The company being called upon to plead, Mr. Beyfus took the point that the indictment against the company was bad because certain provisions of certain Acts of Parliament had not been complied with. It was said that there was no order in force by the examining magistrate giving leave to the prosecutor to prefer the bill of indictment, and that as there was no order in force no bill of indictment could be preferred. The learned judge overruled that contention. He held that a written order was not necessary and that as the magistrate had said when the case was before him that he committed the defendants for trial, that was a sufficient compliance with the provisions of the Administration of Justice Act, 1925.

It is necessary before I state the grounds on which the court has decided this case, to say a word about the facts. The company, with two other persons who were employed by them, had been charged before the magistrate with this offence. The magistrate was not dealing with the offence himself but it was sent forward for trial. At the end of the hearing before him, the magistrate said that he committed all the defendants for trial. On the afternoon before the case was actually heard at the assizes, an inquiry was made by the solicitor for the defence of the stipendiary magistrate's clerk whether any order had been made by the magistrate under s. 33 of the Criminal Justice Act, 1925, empowering the prosecutor to prefer a bill at the assizes, and he was told that no order had been made. Thereupon, by the next morning, or on the next morning before the arraignment of the defendants, an order was made by the magistrate in writing which would comply with the provisions of the statute and was dated by him nunc pro tunc, that is to say, he dated it back to January 25, 1949. I do not think that there is any reflection on the magistrate for having done that, nor do I think it makes any difference that he did not draw up the order on the date on which the case was heard. If he decided to make the order, he could make it at a date subsequent to the date on which he actually announced his decision provided that it was otherwise made in time.

I understand the law applicable to the present case to be as follows: Formerly at common law, it was possible for anybody to prefer a bill of indictment to a grand jury against either an individual or against a corporation, and if the grand jury returned a true bill, that converted the bill into an indictment to which the defendant had to plead. That remained the common law, subject to the Vexatious Indictments Act, 1859, which restricted the right of a person to prefer a bill to a grand jury in respect of certain classes of offences. It continued to be the law until the passing of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which abolished grand juries. It should be added that during the war of 1914-18, for the purpose of saving manpower, there had been passed the Grand Juries (Suspension) Act, 1917.

During the time when that Act was in force, it ceased to be open to any subject of the King to prefer a bill of indictment of his own motion unless one or other of certain preliminary proceedings had been taken, and since the passing of the Act of 1933 the position has become, in substance, the same as when the Act of 1917 was in force. Before a bill can be preferred there must either be a committal for trial by examining justices sitting under the Indictable Offences Act, 1848, or leave granted by a judge of the High Court, or—one other exception—a committal for trial under the Perjury Act, 1911, by the court before whom the perjury was committed. The voluntary bill, as it used to be called, no longer exists. It is still open to a person who desires to prefer a bill, as for instance in a case where magistrates have refused to commit for trial, to apply to a judge for leave to prefer a bill, but it will no longer be a voluntary bill because it will be preferred by permission of a judge; the old practice under which any person on the first day of assizes could take a bill of indictment and hand it to the clerk of assize and require that it should be put before the grand jury has gone.

While the Grand Juries (Suspension) Act, 1917, was in force, a company called the Daily Mirror Newspapers Ld., was indicted at the general sessions for Hertford for an offence, and objection was taken that the indictment was bad because there could have been no committal for trial of the company. "Committal for trial" is defined in s. 27 of the Interpretation Act, 1889, which provides that: "In every Act passed "after the commencement of this Act, the expression "'committed for trial' used in relation to any person shall, "unless the contrary intention appears, mean, as respects "England and Wales, committed to prison with the view "of being tried before a judge and jury, whether the person "is committed in pursuance of section twenty-two or of "section twenty-five of the Indictable Offences Act, 1848, "or is committed by a court, judge, coroner, or other authority "having power to commit a person to any prison with a view "to his trial, and shall include a person who is admitted to "bail upon a recognizance to appear and take his trial before "a judge and jury." A company cannot be committed to prison or held to bail, and it was ruled in *Rex* v. *Daily Mirror Newspapers Ld.* (1), that so long as the Grand Juries (Suspension) Act, 1917, was in force, a bill could not be preferred to a court unless there had been either a committal for trial, an order of a judge, or (in the case of perjury) an order made under the Perjury Act.

As in that case there had been no order by the judge, it followed that unless there had been a committal for trial, the indictment was bad because there was no power to prefer it, and the court so held. Therefore, I suppose in consequence of that decision, the Criminal Justice Act, 1925, s. 33 provided: "Where a corporation is charged, whether alone "or jointly with some other person, with an indictable offence, "the examining justices may, if they are of opinion that the "evidence offered on the part of the prosecution is sufficient "to put the accused corporation upon trial, make an order "empowering the prosecutor to present to the grand jury "at assizes or quarter sessions, as the case may be, a bill "in respect of the offence named in the order, and for the "purpose of any enactments referring to committal for trial "(including this Act) any such order shall be deemed to be "a committal for trial."

Then there were certain provisoes which are immaterial. It seems to me that that Act did not take away the old common law right of preferring a bill against a corporation, but was dealing with a case in which a corporation had been charged before magistrates and the magistrates had determined to

(1) [1922] 2 K. B. 530.

send the case forward for trial. That was the provision in the Act of 1925.

Then came the Act of 1933 which abolished grand juries. Section 1, sub-s. 1, provides: "Subject to the provision "of this section grand juries are hereby abolished, but where "a bill of indictment has been signed in accordance with "the provisions of this Act, the indictment shall be proceeded "with in the same manner as it would have been proceeded "with before the commencement of this Act if it had been "found by a grand jury . . . ." Section 2 provides: "Subject to the provisions of this section, a bill of indictment "charging any person with an indictable offence may be "preferred by any person before a court in which the person "charged may lawfully be indicted for that offence, and "where a bill of indictment has been so preferred the proper "officer of the court shall, if he is satisfied that the requirements of the next following sub-section have been complied "with, sign the bill, and it shall thereupon become an "indictment and be proceeded with accordingly: Provided "that if the judge or chairman of the court is satisfied that "the said requirements have been complied with, he may, "on the application of the prosecutor or of his own motion, "direct the proper officer to sign the bill and the bill shall "be signed accordingly." Then the important sub-s. 2 is this: "Subject as hereinafter provided no bill of indictment "charging any person with an indictable offence shall be "preferred unless either—(*a*) the person charged has been "committed for trial for the offence; or (*b*) the bill is "preferred by the direction or with the consent of a judge "of the High Court or pursuant to an order made under "section nine of the Perjury Act, 1911." So, there again, the same position arises that the old common law right is taken away and a voluntary bill can only be preferred if there has been a committal for trial, or on the order of a judge.

In this case, the first point argued by Mr. Arthian Davies in support of the indictment was that the magistrate, in committing for trial, had in effect given leave to the prosecutor to prefer a bill under the provisions of s. 33 of the Criminal Justice Act. He supported that contention by saying that the statute did not require the order to be in writing, and the learned judge so held. With all respect to the learned judge, this court is unable to take that view. Where a statute makes an order of a particular character a necessary condition precedent to the doing of some other act, we have no doubt that we must construe that section as meaning that the order must be an order in writing—an order of the court drawn up under the hand of the presiding magistrate and bearing the seal of the court. The order must be authenticated, and if any question arises whether or not an order has been made, the right way of proving the order is by producing it, and an order can only be produced if it is an order in writing. In the present case there was no order drawn up and authenticated at the time; what the magistrate in fact did was to say that he committed the defendants for trial, and on the analogy of *Rex* v. *Daily Mirror Newspapers Ld.* (1) he had no power to commit for trial, because it is not possible to commit a corporation for trial. The proper procedure was to have made an order. If, having made up his mind that there was a case to go for trial, the magistrate had drawn up the order afterwards, there would have been no objection to it merely on the ground that he did not have it drawn up on the actual day of the hearing of the case. If a court gives its decision orally, as it almost invariably does, the order is drawn up afterwards. It may be drawn up the same day; it may be drawn up a day, or two or three days after, or even a considerable time after. It is well known, for instance, that in the Chancery Division of the High Court, where orders have to be passed by the registrar, they are not in fact drawn up until quite a considerable time after the judge has given his judgment. So in the King's Bench Division orders are very often not drawn up till some days after the trial.

But in fact in the present case the order giving leave to prefer a bill was not drawn up until the morning of the arraignment. I think we must infer that by that time the bill of indictment had been signed, because I am quite certain that if it had not been signed and the clerk of assize had been waiting for the order to come through he would have said to the judge: "The order came through this morning and "I signed the bill after I got it."

It follows, as I have said, that the time of the signing of the bill is the critical moment, and it becomes so by reason of the provisions of the Act to which I have referred: The bill becomes an indictment as soon as it is signed.

I think we must put our decision on this ground: We must

---

(1) [1922] 2 K. B. 530.

C. C. A.

1949

Rex
v.
H.
Sherman
Ld.

hold that in the particular circumstances this order was not made by the magistrate before the bill was signed. That being so, when the bill was signed and when, therefore, the indictment became effective there had not been a compliance with s. 33 of the Criminal Justice Act, 1925. There had been a committal for trial which was nugatory, and the position would have been the same as if the magistrate had refused to commit for trial. If he had refused to commit the company and the other defendants for trial, the prosecution could still have gone to a judge in chambers and obtained leave to prefer a bill, but if they had done so it would be wrong to say that the defendants were committed for trial.

For the reasons which I have endeavoured to express, the court is of opinion that effect must be given to the preliminary point taken by Mr. Beyfus, and that we must hold that the bill of indictment against the company was bad.

It follows from what I have said—and I desire to repeat it by way of emphasis—that it is the duty of the clerk of assize in any case in which it is proposed to indict a company, to be satisfied before he signs the bill that the necessary order has been made.

Preliminary objection upheld.

Solicitors for the appellants: *Stuart Hallinan, Hill and Mackintosh Thomas, Cardiff.*

Solicitor for the prosecution: *S. Tapper Jones, Town Clerk, Cardiff.*

P. B. D.

[*Note.*—The appeals of the individual appellants were allowed by the court on July 11 on grounds not calling for a detailed report: see [1949] W. N. 318.]

LARNER *v.* LONDON COUNTY COUNCIL.

C. A.

1949
Mar. 29, 30, 31;
Apr. 11.

Lord Goddard C.J. Denning L.J. and Birkett J.

Mistake—Promise by local authority to pay employees on war service excess of wage over service pay—Overpayment made, through no fault of employer—Right of employer to recover overpayment, unless employee had changed his position for the worse.

Employers, a local authority, promised until further order to pay all their employees who, during the war, entered the Services, the difference between their war service pay and their wage in civil employment, requiring that each such employee should be responsible for advising the employers immediately of any change arising in the amount of his war service pay, when the authority would make consequential adjustments, by deduction, from subsequent payments made to the employee.

An employee who had joined the R.A.F. did not keep the authority accurately informed of the changes in his service pay and the authority overpaid the employee—an act found not to be due to any carelessness on the part of the authority.

Held: (1.) that the promise, though voluntary, being made for good reasons of national policy, the authority was, in honour, bound to fulfil it; (2.) that the payments, made under the promise, were not mere gratuities, but made as a matter of duty; and (3.) the overpayment being made under a mistake of fact, the authority, unless the employee had changed his position for the worse, because of the overpayment, could recover it from their employee. Speaking generally, the fact that the employee had spent the money beyond recall, was no defence, unless there were some fault on the part of the paymaster and none on the part of the recipient.

APPEAL from the Southwark county court.

The facts, as set out in the judgment of the court, were as follows: On October 17, 1939, the London County Council, acting under statutory authority, resolved to pay all their men who went to the war the difference between their war service pay and their civil pay until further order. The resolution expressly provided that every man should be responsible for advising the council "immediately of any "change arising in the amount of his war service pay" and the council should "be authorized to make consequential "adjustments by deductions from subsequent payments" to him.

Mr. Larner was an ambulance driver employed by the London County Council. He was a married man with two children. He was not called up until March, 1942. He had not actually seen the resolution of the council, but he knew they had made a decision to make up the difference between war service pay and civil pay and that it was his business to tell them what was his war service pay. Moreover when he went into the Royal Air Force, he filled in a form asking that the allowance "due" to him should be paid to his wife; and on that form there was a clear notice that all alterations in service pay were to be notified immediately to the council.

It was indeed obvious in 1939 that the men ought to tell the council of any changes in their war service pay, because otherwise the council would not be able to work out what the difference was. At that time the service department would not inform employers what a man's service pay was, but three years later they changed their policy and gave the information, when asked for it. Though this served as a valuable check on the information supplied by the man, it did not do away with the necessity for the men themselves telling the council of any changes in their service pay. Indeed most of the 7,000 or 8,000 men employed by the council who had entered the Services did so quite regularly.

Mr. Larner did not keep the council accurately informed of the various changes in the amount of his war service pay; and when he did tell them, they did not rely on what he said. They relied on the information received from the Royal Air Force. But this information was only given, on request, and was not always accurate. Nevertheless, unless Mr. Larner told the council whenever he had a rise in service pay, they would not have occasion to ask the Royal Air Force for any information on the subject. Hence, if he did not tell them of a rise, a long time might elapse before it came to their notice. Meanwhile they would have been paying him too much. This can be illustrated from the facts of the case. Take, for the sake of simplicity, Mr. Larner's service pay excluding the family allowances.

On March 16, 1942, his service pay was 2*s*. 6*d*. a day. This was certified by the Royal Air Force authorities to the council, who paid the difference accordingly. In and after October, 1942, at the end of six months' training, he had increases in pay, and by March, 1943, he was receiving service pay of 5*s*. 0*d*. a day. There is no trace of any letter from him telling the council of this increase to 5*s*. 0*d*. The council were calculating his allowance on the basis that he was only receiving service pay of 3*s*. 0*d*. a day. They did not become aware of the increase to 5*s*. 0*d*. until July, 1944, and then only because a query had arisen on family allowances which made them write to the Royal Air Force for information about his pay. Meanwhile the council had been overpaying him at the rate of 2*s.* 0*d.* a day, that is, 2*l.* 16*s.* 0*d.* too much on every monthly cheque they sent him or his wife. The judge has found that this was not due to any carelessness on their part. When they discovered the over-payments, they told him about it and started to make deductions from his monthly allowance in order to recoup themselves; and a few months later they discontinued payments to him altogether. But they had not succeeded in recouping themselves by the time he was demobilized. He returned to their service and in due course they started to deduct 10*s.* 0*d.* a week from his wages on account of the balance outstanding. He disputed their right to do this and brought this action for 22*l.* 10*s.* 0*d.*, being 10*s.* 0*d.* a week, withheld for forty-eight weeks. The council counterclaimed for the balance of the sum overpaid which was said to be 52*l.* 10*s.* 0*d.* His Honour Judge Daynes dismissed the plaintiff's claim and allowed the council's counterclaim.

The plaintiff appealed.

P. M. O'Connor for the plaintiff. This was a voluntary payment made by the London County Council which was not made in discharge of any legal liability, and, therefore, they cannot recover it. They could have revoked or altered the resolution at any time as they, in fact, reserved power to do since it was made "until further order." The mistake on which a person can recover money paid must relate to a fact which, if true, would have rendered the party under the mistake liable to pay the money. See the dictum of Bramwell B. in *Aiken* v. *Short* (1). It was clear that the plaintiff, when he joined the R.A.F. was no longer in the service of the London County Council. See the judgment of Lord Porter in *National Association of Local Government Officers* v. *Bolton Corporation* (2). The effect of the Local Government Staffs (War Service) Act, 1939, was to put the local government corporation in the same position as a private individual, subject to the limitations imposed by the Act itself. There was no contract here to make these payments.

Secondly, it is plain that the failure by the plaintiff to acquaint the council of his rises of pay was not the cause of

---

(1) (1856) 1 H. & N. 210, 215.

(2) [1943] A. C. 166, 193.

C. A.

1949

LARNER
v.
LONDON
COUNTY
COUNCIL.

the overpayment, since the council relied only on the information from the R.A.F. headquarters. No error on the part of the plaintiff contributed to the overpayment. The plaintiff had, by the council's conduct, been led to believe that he might treat the money as his own and in that belief had altered his position by spending it. Accordingly, the council were estopped from alleging that it was paid under a mistake: *Holt* v. *Markham* (1) [He was stopped on this point].

Lloyd-Jones for the defendants.

[LORD GODDARD C.J. How do you distinguish that case from *Holt* v. *Markham* (1) ?]

In that case the plaintiffs were Army agents and bankers and the case turns on (1.) the very special duty which a bank owes to its customer, and (2.) that the mistake, there, was held to be one of law. The plaintiff in this case, Larner, was under an express obligation to give the council information as to his increases of pay. The obligation was embodied in the resolution of the council and clear notice of it was given to him on the form which he filled up, asking that the allowance "due" to him from the council should be paid to his wife. The overpayment arose simply because Larner did not give this information to the council, who though, ultimately, they may have relied on the results of their inquiries to the Paymaster R.A.F., were not put on that inquiry, until they heard from Larner that he had received an increase of pay. The mistake here was plainly one of fact for which the council were in no way to blame; the mistake was simply as to how much pay Larner was receiving from the R.A.F. *Weld-Blundell and Others* v. *Synott* (2) and *Standish* v. *Ross* (3). In *Skyring* v. *Greenwood and Cox* (4) and *Holt* v. *Markham* (1) there was fault on the part of the paymaster and none on the part of the recipient of the pay.

[LORD GODDARD C.J. We need not trouble you as to the first point made by the plaintiff.]

Further, as was contended in the county court, since the Local Government Staffs (War Service) Act, 1939, only authorized a local authority to make up the remuneration of their officers to the level of the remuneration which those officers would have received, if they continued to serve in their civil capacity, the overpayments which were made, were ultra vires. On that ground also, those payments could be recovered by the council. The resolution of the council which Larner agreed to, by taking the money, authorized the council to deduct the overpayments from his wages.

---

(1) [1923] 1 K. B. 504.

(2) [1940] 2 K. B. 107.

(3) (1849) 3 Exch. 527.

(4) (1825) 4 B. & C. 281.

P. M. O'Connor continued and in reply. This is a plain case of estoppel in pais. In the words of Lord Birkenhead L.C. in *Maclaine* v. *Gatty* (1) : " Where A. has by his words or con-" duct justified B. in believing that a certain state of facts exists, " and B. has acted upon such belief to his prejudice, A. is not " permitted to affirm against B. that a different state of facts " existed at the same time." Here the plaintiff did act upon such belief to his prejudice by spending the money paid to his wife. See also the definition of estoppel in pais in *Carr* v. *London and North Western Ry. Co.* (2) and the speech of Lord Cranworth L.C. in *Jorden* v. *Money* (3) and the cases there cited of *Freeman* v. *Cooke* (4) and *Pickard* v. *Scars* (5) *Greenwood* v. *Martins Bank Ld.* (6) was also mentioned]. As to the point that these payments were ultra vires they were incidental to or consequential upon what the legislature had authorized. In any case the London County Council had no power, in the absence of a contract to do so, to deduct this overpayment from the wages of the plaintiff. In any case, therefore, the plaintiff is entitled to judgment on his claim.

Cur. adv. vult.

April 11. DENNING L.J. read the following judgment of the court: When the men went to the war, many local authorities made up to them the difference between their war service pay and their civil pay. Sometimes overpayments were made and the question is whether the men are bound to repay the excess.

The real question in this case arises on the counterclaim: Are the council entitled to recover from Mr. Larner the sums which they overpaid him? Overpay him they certainly did. That is admitted. And the overpayment was due to a mistake of fact. That is also admitted. They were mistaken as to the amount of his service pay. But it is said that they were voluntary payments, which were not made in discharge of any legal liability, and cannot therefore be recovered back. For this proposition reliance was placed on the dictum of Bramwell B. in *Aiken* v. *Short* (1); but that dictum, as Scott L.J. pointed out in *Morgan* v. *Ashcroft* (2), cannot be regarded as an exhaustive statement of the law. Take this case. The London County Council, by their resolution, for good reasons of national policy, made a promise to the men which they were in honour bound to fulfil. The payments made under that promise were not mere gratuities. They were made as a matter of duty: see *National Association of Local Government Officers* v. *Bolton Corporation* (3). Indeed that is how both sides regarded them. They spoke of them as sums "due" to the men, that is, as sums the men were entitled to under the promise contained in the resolution. If then, owing to a mistake of fact, the council paid one of the men more than he was entitled to under the promise, why should he not repay the excess, at any rate if he has not changed his position for the worse? It is not necessary to inquire whether there was any consideration for the promise so as to enable it to be enforced in a court of law. It may be that, because the men were legally bound to go to the war, there was in strictness no consideration for the promise. But that does not matter. It is not a question here of enforcing the promise by action. It is a question of recovering overpayments made in the belief that they were due under the promise, but in fact not due. They were sums which the council never promised Mr. Larner and which they would never have paid him had they known the true facts. They were paid under a mistake of fact, and he is bound to repay them unless he has changed his position for the worse because of them.

---

(1) [1921] 1 A. C. 376, 386.

(2) (1875) L. R. 10 C. P. 307, 316–7.

(3) (1854) 5 H. L. C. 185, 212.

(4) (1848) 2 Exch. 654.

(5) (1837) 6 Ad. & El. 469.

(6) [1933] A. C. 51.

It is next said, however, that Mr. Larner did change his position for the worse before the council asked for the money. He spent the money on living expenses—or his wife spent it for him—and he spent it in a way which he would not otherwise have done. This defence of estoppel, as it is called—or more accurately, change of circumstances—must, however, not be extended beyond its proper bounds. Speaking generally, the fact that the recipient has spent the money beyond recall is no defence unless there was some fault, as, for instance, breach of duty—on the part of the paymaster and none on the part of the recipient. In both *Skyring* v. *Greenwood and Cox* (1) and *Holt* v. *Markham* (2) there was a breach of duty by the paymaster and none by the recipient. See *Jones (R. E.) Ld.* v. *Waring and Gillow Ld.*, per Lord Sumner (3).

---

(1) 1 H. & N. 210, 215.

(2) [1938] 1 K. B. 49, 73–74.

(3) [1943] A. C. 166, 180, 187.

But if the recipient was himself at fault and the paymaster was not—as, for instance, if the mistake was due to an innocent misrepresentation or a breach of duty by the recipient—he clearly cannot escape liability by saying that he has spent the money. That is the position here. On the judge's findings, the London County Council was not at fault at all, but Mr. Larner was. He did not keep them accurately informed of the various changes in his service pay. It does not lie in his mouth to say that, if he had done so, it would have made no difference. It might well have put them on inquiry and the mistake might not have been made at all. It would be strange, indeed, if those who neglected their duty were to be allowed to keep their gain.

This view of the case makes it unnecessary to discuss the question of ultra vires.

The one remaining question is whether the London County Council were entitled to recoup themselves, after Mr. Larner's return, by deductions from his wages. In point of law they were not entitled as of right to make deductions from his wages except by agreement with him; and we do not think that the resolution is such an agreement. It is, however, of no practical consequence in this action because the amounts due on claim and counterclaim must clearly be set off one against the other. The judge below has given judgment for the balance and that is the correct way of doing it. This appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff: *Foss, Bilbrough, Plaskitt & Co.*

Solicitor for the defendant: *J. H. Pawlyn, The Solicitor, London County Council.*

(1) 4 B. & C. 281.

(2) [1923] 1 K. B. 504.

(3) [1926] A. C. 670, 693.

C. G. M.

CLARKE
[1950] 1 K. B. 523

C. C. A.

1949
July 14.

Lord Goddard C.J., Oliver and Stable JJ.

REX *v.* FAIRBAIRN.

Criminal law—"Suspected person"—Evidence—Proof of previous conviction—Admissibility—Firearms Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2—*Vagrancy Act,* 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

Evidence of a previous conviction is admissible to establish that a person who is arrested under s. 4 of the Vagrancy Act, 1924, on a charge of loitering with intent to commit a felony, is a "suspected person" within the meaning of the section at the time of his arrest.

APPEAL against conviction.

The appellant, W. J. Fairbairn, was charged on an indictment with being in possession of a firearm contrary to s. 23, sub-s. 2, of the Firearms Act, 1937. By that sub-section "If any "person, at the time of his committing, or at the time of his "apprehension for, any offence specified in the Third Schedule "to this Act, has in his possession any firearm, he shall . . . . "be guilty of an offence under this sub-section, and on con"viction thereof on indictment he shall be liable to penal "servitude . . . ." Among the offences specified in sch. III to the Act, are included: "Offences under such of the provi"sions of s. 4 of the Vagrancy Act, 1824, as are referred to "in and amended by s. 15 of the Prevention of Crime Act, "1871 . . . ." By s. 4 of the Vagrancy Act, 1824 (as amended by s. 15 of the Prevention of Crime Act, 1871): "Every suspected person or reputed thief, frequenting . . . . "any highway or any place adjacent to a street or highway "with intent to commit felony . . . . shall be deemed a "rogue and vagabond." Section 15 of the Prevention of Crime Act, 1871, also provides that "in proving the intent "to commit a felony it shall not be necessary to show that "the person suspected was guilty of any particular act or "acts tending to show his purpose or intent, and that he may "be convicted if from the circumstances of the case and from "his known character as proved to the court before . . . . "which he was brought, it appears . . . . that his intent "was to commit a felony, ..." It was alleged that on November 30, 1948, at the time of his apprehension as a suspected person loitering with intent to commit a felony in Merrion Street, in the City of Leeds, the appellant unlawfully had in his possession a certain firearm, namely a ·22 revolver.

Evidence was given that at 4.25 p.m. on the day in question two police officers were on duty in King Street, Leeds, and saw three men whom they knew to be suspected persons, one of whom was the appellant, and kept them under observation. In different streets the officers watched the men stop and look into several stationary and unattended motor cars. In Merrion Street, they saw the appellant try the doors of a car, which he found locked. The men saw the police officers and ran away. The officers chased the appellant and caught him and in the pocket of his overcoat, the revolver was found. At the trial of the appellant before Streatfeild J., evidence was tendered that on June 17, 1948, the appellant was sentenced to six months' imprisonment on a charge of taking away a motor car without the consent of the owner. Streatfeild J. admitted the evidence of the previous conviction on the ground that it was relevant to the issue whether the appellant was a suspected person at the time of his arrest. The jury convicted the appellant.

M. Gosnay for the appellant. Streatfeild J. was wrong in allowing evidence of the appellant's previous conviction to be given to the jury. Under s. 4 of the Vagrancy Act, 1824, three things must be proved before an offence is established. Firstly it must be proved that the accused was a suspected person, secondly, that he was loitering and, thirdly, that he had the intent to commit a felony. Section 15 of the Prevention of Crime Act, 1871, is dealing only with the question of intent and it was never intended under it that evidence of character should be admissible before a jury. The cardinal principle is that a jury should not know of the previous bad character of an accused person, unless his character has been put in issue by the defence, and the admission of the evidence in the present case was outside the spirit, intent and scope of s. 15. Previous convictions are only admissible under the section to prove intent and Streatfeild J. misdirected the jury as to the purpose for which the evidence was given by saying that the evidence of the previous conviction was admitted to show that the appellant was a suspected person. If evidence of a previous conviction was admissible under s. 15 to prove both that the accused was a suspected person and that he had the intention of committing a felony, the prosecution would only have to prove that he was loitering to establish an offence under s. 4 of the Vagrancy Act, 1824.

The result might be that a man in a shop doorway who had been previously convicted, could be arrested and charged under s. 4 when there was no evidence of shopbreaking or attempted shopbreaking. In *Rex* v. *Cadwell* (1) it was stated by Talbot J. that the provisions of the Vagrancy Act, 1824, were not intended to provide a convenient method for supplying a hiatus in evidence of felony: see also *Rex* v. *Dean* (2). Evidence of previous convictions or previous bad character is not necessary to bring a person within s. 4 as being a suspected person: *Hartley* v. *Ellnor* (3). A "suspected "person" is proved to be such by acts antecedent to that which gives rise to his arrest, and a previous conviction, whether recent or remote is not an antecedent act for this purpose." "Suspected person" is not a status such as that, e.g., of an habitual criminal, but only a description, and a man may be a suspected person on one day and not on another: *Hartley* v. *Ellnor* (3). The use of the word "status" by the judge in relation to a suspected person and his direction to the jury generally, led them to believe that it was an indisputable fact that the appellant was a suspected person in law and in fact. [He also referred to *Ledwith* v. *Roberts* (4); *Rawlings* v. *Smith* (5); and *Cohen* v. *Black* (6).]

H. R. B. Shepherd for the Crown was not called on to argue.

LORD GODDARD C.J. Notwithstanding the painstaking and able argument of Mr. Gosnay, the court is of opinion that the conviction was right and that there was no misdirection by the judge. The appellant was charged before Streatfeild J. with an offence under s. 21, sub-s. 2, of the Firearms Act, 1937. By that sub-section "if any person, at the time of his commit-"ting, or at the time of his apprehension for, any offence "specified in the Third Schedule to this Act has in his possession "any firearm, he shall, ... be guilty of an offence under "this sub-section . . . ." One of the offences mentioned in the schedule is an offence "under such of the provisions of "section four of the Vagrancy Act, 1824, as are referred to "in, and amended by, section fifteen of the Prevention of "Crime Act, 1871, and section seven of the Penal Servitude "Act, 1891."

Section 4 of the Vagrancy Act, 1824, as amended by s. 15

---

(1) (1927) 20 Cr. App. R. 60.
(2) (1924) 18 Cr. App. R. 133.
(3) (1917) 117 L. T. 304.
(4) [1937] 1 K. B. 232.
(5) [1938] 1 K. B. 675.
(6) [1942] 2 All E. R. 299.

of the Prevention of Crime Act, 1871, provides that: "Every "suspected person or reputed thief, frequenting . . . . any "street or any highway or any place adjacent to a street or "highway . . . . with intent to commit felony" is guilty of an offence, that is to say, he is to be treated as a rogue and vagabond.

By s. 15 of the Prevention of Crime Act, 1871, it is provided "that in proving the intent to commit a felony it shall not "be necessary to show that the person suspected was guilty "of any particular act or acts tending to show his purpose "or intent, and that he may be convicted if from the "circumstances of the case and from his known character as "proved . . . . it appears . . . . that his intent was to "commit a felony." There is no doubt that under the words of that section, if strictly construed, the character of the defendant can be given in evidence and therefore previous convictions can be proved on the question whether he intended to commit a felony.

Since that section was passed, the question of what it is necessary to prove before a person can be convicted of being a suspected person has been the subject of a great many cases, the leading authority being *Ledwith* v. *Roberts* (1). That was a case in which police officers observed two men, who had no previous convictions and who had not up to that time been suspected of any particular crime, acting in a manner which made the police at that time think they were up to no good, if I may put it in that way. They arrested them without warrant as suspected persons, and the Court of Appeal held that the mere suspicion entertained by the police at the time, as the result of one particular act which the men were doing, was not enough to put them into the category of suspected persons. There must be antecedent acts, but those antecedent acts may have occurred on the same day of the arrest, as for instance, in *Hartley* v. *Ellnor* (2). In that case the police had been keeping two suspected pickpockets under careful observation for a considerable period at omnibus stops and had watched them going up and down touching people's pockets. After this had been observed for a long time the police arrested them, and they were convicted, and it is now, I think, well established by other decisions that *Ledwith* v. *Roberts* (3) must not be taken as throwing any doubt on the correctness of the decision in *Hartley* v. *Ellnor* (2).

---

(1) [1937] 1 K. B. 232.

(2) 117 L. T. 304.

(3) [1937] 1 K. B. 232, 264.

When *Ledwith* v. *Roberts* (1) is read carefully, what it lays down is that before the arrest is made, the conduct or character of the people concerned must be such that they come fairly within the category of being suspected persons. If people who have been previously convicted of theft are found loitering in the streets and their conduct is such as to give rise to a proper and reasonable suspicion that they are there for the intention of committing a felony, they are guilty of an offence under the Vagrancy Act, 1824, and can be dealt with as suspected persons loitering with intent to commit a felony. It is clear from the judgments in *Ledwith* v. *Roberts* (1) that if the police in that case had been able to show that the two men they arrested had been previously convicted, there would have been no doubt that the arrest would have been justified. It was just because the police could give no evidence of antecedent acts or of antecedent character that the Court of Appeal held that it was impossible to say that the men came within the category of suspected persons.

I notice that Scott L.J., in the course of a very comprehensive and full judgment said: "There was some discussion before "us on the meaning of the phrase 'suspected person' in "s. 4, it being contended, as I understood, that it covered "not only the case of a person who had already become on "his previous record reasonably suspected by the police "so as to bring him into a definite and quasi-objective category "—on the analogy of the phrase 'reputed thief'—but also a "case where on the very occasion of arrest the arresting "constable observes the person doing something which "arouses his suspicion." The learned Lord Justice in that case obviously had in mind the fact that it would be possible to prove that a person was a suspected person by proving his previous record and character, and as a matter of common sense that must be so. If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had half a dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions. Those previous convictions supply evidence of his intention to commit a felony.

In the particular case before us, the evidence of the police officers was that they saw the appellant and two other men, all of whom they knew to be suspected persons, and the reason

(1) [1937] 1 K. B. 232, 264.

why the police knew that the appellant was a suspected person was because he had been previously convicted. He came, therefore, within the category of a suspected person. That, however, would not of itself be enough because a man with previous convictions cannot be arrested for dishonesty merely because he is walking down a street. That, of course, would be absurd. It is necessary to show that a man with a bad character, and known to the police as a person with a bad character, is acting in such a way as to justify an arrest. There was ample evidence in this case, if the jury accepted it, because the evidence of the police officers was that they had seen these men peering into motor cars and trying the doors; in other words, seeing if they could find a motor car with an open door, and if they did, it would be a reasonable inference that they intended to take the car and drive it away, or, if not that, to lay their hands on any portable property in the car. That is why they were arrested.

It is true that the judge in charging the jury said: "Members "of the jury, the question of being a suspected person is one "of a status a man has acquired; the unenviable status of "being a suspected person. For that purpose, and for that "purpose only, as I explained to you before, the prosecution "have given evidence before you that on June 17 of last "year, he was convicted and sentenced to six months' "imprisonment on a charge of taking away a motor car without "the consent of the owner."

At first sight it might appear from the above passage that Streatfeild J. was guilty of an inaccuracy in saying that the evidence of the appellant's previous conviction was given only for the purpose of showing that he was a suspected person, because s. 15 of the Prevention of Crime Act, 1871, allows evidence of character to be given with the object of proving the intent to commit a felony. It is clear, however, from the decision in *Ledwith* v. *Roberts* (1) that apart from s. 15 of the Prevention of Crime Act, 1871, and dealing only with s. 4 of the Vagrancy Act, 1824, to prove that a person is a suspected person under that section, he must be brought within that category before he commits the suspicious act for which he is actually arrested and it must, we think, be obvious that the prosecution must be allowed to prove a man's previous convictions, to show that he was a suspected person. It is those previous convictions that make him a suspected person and previous convictions can always be proved if they are relevant to the charge before the court.

---

(1) [1937] 1 K. B. 232.

The reason why the evidence of previous convictions is not allowed to be given in the ordinary case is because they are not considered relevant. If the charge against a man is of breaking and entering a house on January 1, 1949, it is not relevant to that charge to prove that he was convicted of breaking and entering a house on January 1, 1948, since it would only go to show that he was a person who might be likely to commit an offence, but not that he had committed that offence. But when an Act like the Vagrancy Act, 1824, which has been now on the statute-book for 125 years and which has been authoritatively expounded by the Court of Appeal provides that it is necessary to bring a person within the category of a suspected person, there is no better evidence that such person comes within that category than proof that he has had one or more previous convictions.

In these circumstances the court is of opinion that the charge given by the judge to the jury in this case was perfectly right and the appeal is dismissed. Perhaps the judge in his charge confined it within too narrow a limit, in other words, his charge was rather more favourable to the prisoner than it need have been, because in the opinion of the court the evidence of a previous conviction which could by the Prevention of Crime Act, 1871, be given as evidence of intent is now, by the decision in *Ledwith* v. *Roberts* (1) clearly also admissible to bring a person within the category of a suspected person.

Appeal dismissed.

Solicitors for the appellant: *Lesser & Co.*

Solicitor for the prosecution: *Solicitor to the Metropolitan Police.*

(1) [1937] 1 K. B. 232.

P. B. D.

HARRIS *v.* ROWLEY.

C. A.

1949
July 26, 27.

Evershed M.R., Somervell and Denning L.JJ.

Landlord and tenant—Rent restriction—Possession—Certificate of County Agricultural Executive Committee that a farm worker "was "employed" on work necessary for the working of an agricultural holding—Employee dies—Another worker agrees to do work if cottage available—Whether certificate valid—Omission of words "or is to "be employed"—Immaterial mistake—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *sch.* I, *para.* (*g*) (*ii*).

The respondents were farmers and in 1947 they purchased a cottage in which the appellant had lived for many years. Having engaged one W. they applied to the County Agricultural Executive Committee for a certificate under para. (*g*) (ii) of the First Schedule to the Rent Restrictions Act of 1933. The committee gave a certificate in the following form: The committee "hereby certify "that a general farm worker for whose occupation the cottage ". . . . is required by H. & Son, landlord, is employed on "work necessary for the proper working of the agricultural "holding known as S. farm." After the certificate had been given, W. died and the plaintiffs found another man in his place who was ready to do the work on condition that he could have the cottage. The respondents, without obtaining a fresh certificate, by these proceedings applied for possession of the cottage. The appellant objected that the certificate was inapplicable. The county court judge overruled the objection and made an order for possession.

Held, dismissing the appeal, that the certificate was a valid certificate for the purposes of the Rent and Mortgage Interest (Restrictions) Act, 1933, sch. I., para. (*g*) (ii). The failure to insert in the certificate the words "or is to be" employed was a failure in an immaterial particular and did not affect the validity of the certificate.

Pickford v. *Mace* [1943] K. B. 623, followed.

APPEAL from Exeter county court.

The respondents, Frederick Harris and Wilfred Harris, carried on business in partnership as farmers under the name of F. Harris & Son at South Whimple Farm, Honiton Clyst, near Exeter. In 1947 they purchased a cottage No. 3, Alexandria Terrace, Broadclyst, which for many years had been in the occupation of the appellant, Sydney Rowley, as tenant. The respondents wanted to obtain possession of the cottage to house a Mr. Wicks, an agricultural worker who was employed by them, and on September 8, 1948, they applied to the Agricultural Executive Committee for a certificate under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I., para. g (ii). A certificate was granted to them in the following terms: The Executive Committee "hereby certifies that a general farmworker for whose occupation the cottage or dwelling-house at 3, Alexandra Terrace, "Broadclyst, is required by F. Harris & Son, landlord, is "employed on work necessary for the proper working of the "agricultural holding known as South Whimple Farm, Honiton "Clyst, near Exeter."

After that certificate had been granted, Mr. Wicks died and the respondents found another farm worker who was willing to take on the work on condition that he could have a cottage. The respondents, without obtaining a further certificate, started these proceedings for possession. The county court judge made an order for possession. The tenant appealed.

Raeburn K.C. and *P. Pain* for the appellant. This appeal should be allowed as the certificate which the respondents obtained did not fulfil the requirements of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). This case is distinguishable from that of *Pickford* v. *Mace* (2). Here the certificate only stated that "a general farm worker "is employed on work necessary for the proper working of "the holding." That certificate is only applicable to one specific farm worker, namely, Mr. Wicks, the farm worker who died. The omission of the words "or is to be employed," made this certificate inapplicable to this case and the county court judge should not have made an order for possession.

L. A. Blundell for the respondents was not called on.

DENNING L.J. Mr. Raeburn frankly conceded for the appellant, as I think he was bound to do, that if the certificate had been in the form, "is, or is to be, employed on work necessary for the proper working of the holding," it would be a good certificate applicable in that situation, but he says because the words " is to be " were omitted, therefore it was an inapplicable certificate.

---

(1) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides by the First Schedule that a court shall have power to make an order for the recovery of possession of a dwelling-house to which the Acts apply without proof of suitable alternative accommodation if (*g*) (ii) "the court is "satisfied by a certificate of the "county agricultural committee ". . . . that the person for whose "occupation the dwelling-house "is required by the landlord is, "or is to be, employed on work "necessary for the proper working "of an agricultural holding."

(2) [1943] K. B. 623.

The answer to this objection, it seems to me, is that the Committee are not concerned with the identity of the individual who is to do the work. They are only concerned with seeing that the agricultural holding is in need of an agricultural worker of a particular kind. Once they are satisfied of the necessity, they give their certificate, and it is then for the court to satisfy itself that such a worker is, or is to be, employed and that the house is reasonably required for him, and that it is reasonable to make an order for possession. That, I think, follows from the judgment of Lord Greene M.R. in *Pickford* v. *Mace* (1). The identity of the individual is therefore not a material part of the certificate. It follows that the failure to insert the words " or is to be " is a failure on a matter which is immaterial. It is familiar law that a mistake in an immaterial part of a document does not affect its validity. A fortiori a failure to provide for an unforeseen immateriality does not affect its validity. In my opinion the decision of the county court judge was right, and the appeal must be dismissed.

SOMERVELL L.J. I agree. Lord Greene M.R. in *Pickford* v. *Mace* (1) summed up the conclusions in which he agreed in these words: " It is, therefore, for the county court judge " to be satisfied on evidence in the ordinary way that the " house is required for a person who is, or is to be, employed, " and he has to be satisfied by the certificate as to the nature " of the work on which that person is to be employed, and it " matters not that when the certificate was obtained no person " was in contemplation because it is sufficient when the " farmer comes before the county court judge for him to " prove that he has a person for whom the house is required " and that the work on which he proposes to employ him " is so-and-so." In that case at the time the certificate was given no one was in contemplation. In one sense the present case is different in that, at the time the certificate was given, a general farmworker was doing the work. The fact that the certificate is drawn up with regard to those circumstances does not, in my view, deprive it of its efficacy in satisfying the county court judge as to the nature of the work on which the person for whom the cottage is then required is to be then employed. For these reasons I think the appeal fails.

(1) [1943] K. B. 623, 628.

C. A.
1949
Harris
v.
Rowley.

Evershed M.R. I also agree. As I follow the case of *Pickford* v. *Mace* (1), the effectiveness of the certificate which relates to the nature of the work to be done is not affected by the circumstance that there is at the time a particular man who is doing it, who had ceased to be doing it when the case came before the court, and when some other individual is then about to do it. The work to be done remains the same, and the effect of the certificate was to say that that work was, within the terms of the paragraph, necessary for the proper working of the holding. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *W. H. Thompson; Ellis and Fairbairn.*

(1) [1943] K. B. 623.

B. A. B.

C. A.
1949
June 15.
Lord Goddard C.J., Tucker and Singleton L.JJ.

JONES *v.* BELLGROVE PROPERTIES LD.

Limitation of action—Action for debt due to shareholder by public limited liability company—Defence, debt did not accrue within six years before action brought—Reply that written acknowledgment of debt signed by agent of company made to plaintiff within those six years—Acknowledgment contained in balance sheet: "To sundry creditors "7,638l. 8s. 10d."—Balance sheet presented at annual general meeting of the company and signed by accountants as agents of company—Plaintiff present at meeting as a shareholder—Oral evidence given by accountant that debt due to plaintiff was included in that figure—Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2; *s.* 23, *sub-s.* 4; *s.* 24, *sub-ss.* 1 *and* 2.

A balance sheet presented to the shareholders at an annual general meeting of a limited liability company signed by chartered accountants, the agents of the company and by two directors, contained the statement: "To sundry creditors 7,638*l.* 6*s.* 10*d.*" The plaintiff attended that meeting as a shareholder.

The company owed the plaintiff 1,807*l.*, the balance of moneys lent to it by him. This debt did not accrue within six years of an action brought by the plaintiff against the company to recover the debt. The annual general meeting was held within that period. At the hearing of the action a witness from the firm of chartered accountants which had signed the balance sheet testified that the debt of 1,807*l.* owed by the company to the plaintiff was included in the sum of 7,638*l.* 8*s.* 10*d.* stated in the balance sheet to be due to sundry creditors.

Held, that the balance sheet contained an acknowledgment to the plaintiff, in writing, signed by the agents of the company, that the debt of 1,807*l*. at the date of the annual general meeting remained unpaid and due to the plaintiff. Accordingly, by virtue of ss. 23 and 24 of the Limitation Act, 1939, the debt was recoverable.

In re Atlantic and Pacific Fibre Importing Co. Ld. [1928] Ch. 836, approved.

APPEAL from Birkett J.

The plaintiff's claim was for the repayment of 1,807*l*., the balance of moneys lent by the plaintiff to the defendant company between September, 1936, and May, 1937. The writ was issued on October 20, 1947. By their defence the company pleaded that the debt did not accrue within six years before action brought and that the claim was barred by s. 2 of the Limitation Act, 1939. The plaintiff replied that within six years before action brought the company made an acknowledgment in writing signed by their agents (Messrs. J. Altman & Co., chartered accountants) to the plaintiff, that the debt remained unpaid and due to him.

Birkett J. found that the plaintiff, who was both a shareholder and a director of the company, had advanced the sum claimed to the defendant company, as and at the time pleaded, and that it had never been repaid. It was proved that at their annual general meeting held on December 31, 1946, the company presented to the shareholders the balance sheets of the company as at May 21, 1939, 1940, 1941, 1942, 1943 and 1945. Contained in their balance sheets was the figure: "To sundry creditors 7,638*l*. 8*s*. 10*d*." The balance sheets were signed by Messrs. J. Altman & Co., chartered accountants, agents of the company, and by two directors of the company. The plaintiff was present at the meeting as a shareholder. Evidence was given by one Morton, an accountant, who in December, 1946, was connected with the firm of J. Altman & Co. He stated that he was responsible for the balance sheets from 1939 to 1945 and produced his working papers. Birkett J. found on that evidence that the figure of 7,638*l*. 8*s*. 10*d*. "to sundry creditors" included the debt of 1,807*l*. due and owing to the plaintiff; and he held that the company had made an acknowledgment in writing signed by their agents to the plaintiff that the debt remained unpaid and due to him on December 31, 1946. He gave judgment for the plaintiff for 1,807*l*.

The company appealed.

Gerald Gardiner K.C. and *Stephen Terrell* for the company. There are two cases on which a statement in a balance sheet has been held to be an acknowledgment of a debt so that the right to the debt shall be deemed to have accrued on and not before the date of the acknowledgment. See, to-day, ss. 23, sub-s. 4 and s. 24, sub-ss. 1 and 2 of the Limitation Act, 1939 (1). The two cases are: *In re Atlantic and Pacific Fibre Importing and Manufacturing Co. Ld.* (2) and *Ledingham and Others* v. *Bermejo Estancia Co. Ld.; Agar and Others* v. *Same* (3). But there was no such acknowledgment in this balance sheet; there was here "a mere statement of facts "and not an acknowledgment of anything to anybody." See the judgment of the Court of Appeal delivered by Lord Clauson in *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury* (4). The words relied on in the balance sheet are: "To sundry "creditors 7,638*l.* 8*s.* 10*d.*" A balance sheet of a company throughout is a mere statement of facts and is not a document of such a character as can constitute an acknowledgment of a debt. If a balance sheet can include such an acknowledgment, there was none here, but merely a general statement of debt to unidentified creditors. A written statement cannot be subsequently made into an acknowledgment by the oral evidence of a witness saying such and such a debt was included in the total. There was no acknowledgment of the debt in writing.

By the terms of s. 24, sub-s. 2, of the Limitation Act, 1939, the acknowledgment must be made to the creditor or his agent. Here, the acknowledgment was made merely to the plaintiff as a shareholder, when he attended the meeting, as such, in December, 1946. A public limited liability company must issue a balance sheet, year by year, showing its debts and if this decision is upheld such a company can never plead the statute against a shareholder creditor.

---

(1) Limitation Act, 1939, s. 23, sub-s. 4: "Where any right "of action has accrued to recover "any debt . . . . and the person "liable or accountable therefor "acknowledges the claim . . . . "the right shall be deemed to "have accrued on and not before "the date of the acknowledg- "ment. . . ."

Section 24, sub-s. 1: "Every "such acknowledgment as afore- "said shall be in writing and "signed by the person making "the acknowledgment." Sub-section 2: "Any such acknow- "ledgment . . . . as aforesaid "may be made by the agent "of the person by whom it is "required to be made under the "last foregoing section, and shall "be made to the person or to "an agent of the person, whose "title or claim is being "acknowledged . . . ."

(2) [1928] Ch. 836.

(3) [1947] 1 All E. R. 749.

(4) [1943] Ch. 104, 109.

[*In re Coliseum (Barrow) Ld.* (1) and *Hartley* v. *Wharton* (2) were also mentioned.]

A. P. Marshall K.C. and *I. H. Jacob* for the plaintiff were not called on.

LORD GODDARD C.J. In my opinion, this appeal fails. The case may appear to have some importance as affecting the power of companies to rely on the provisions of the Limitation Act, 1939; but I wish to make it clear that our decision is based on the special facts of this case. At various dates from September, 1936, to May, 1937, the plaintiff lent to the defendant company, of which he was both a shareholder and a director, sums of money the balance of which, it is now agreed, amounts in all to 1,807*l.* These loans were not repaid, and in 1948, the plaintiff brought this action to recover them. The defendant company in their defence pleaded s. 2, sub-s. 1 (*a*) of the Limitation Act, 1939, and contended that, as the cause of action had accrued more than six years before action brought, the claim was barred. To that contention the plaintiff replied that within six years before the action was brought the person liable or accountable for the claim, the defendant company had acknowledged the claim and that, therefore, by reason of s. 23, sub-s. 4, of the Act of 1939, "the right shall be deemed to have accrued on and not "before the date of the acknowledgment." Evidence was given that at the annual general meeting of the defendant company on December 31, 1946, at which the plaintiff was present in his capacity as a shareholder of the company, the accounts of the defendant company for the years 1939 to 1945 inclusive were presented to the meeting. Those accounts were signed by the company's accountants as agents for the defendant company, and by two directors of the company. They showed that during each of those years 1939 to 1945, the company owed moneys to "sundry creditors." No particular creditors were named in the accounts, but evidence was given, and it was not really disputed, that the sum, shown as due to sundry creditors, included the sum of 1,807*l.* which was due by the defendant company to the plaintiff. The plaintiff contended that the balance sheet presented to him at the meeting constituted an acknowledgment of the debt within the meaning of s. 24, sub-s. 2, of the Limitation Act, 1939, notwithstanding that it was presented to him in his capacity as a shareholder, and not as a creditor, and that, therefore, his claim was not barred. By s. 23, sub-s. 4, of the Act : "Where any right of action has accrued to recover any "debt or other liquidated pecuniary claim . . . . and the "person liable or accountable therefor acknowledges the "claim . . . . the right shall be deemed to have accrued "on and not before the date of the acknowledgment . . . ." Then by s. 24, sub-s. 1 : "Every such acknowledgment as "aforesaid shall be in writing and signed by the person "making the acknowledgment," and by sub-s. 2 : "Any such "acknowledgment . . . . as aforesaid may be made by the "agent of the person by whom it is required to be made under "the last foregoing section and shall be made to the person "or to an agent of the person, whose title or claim is being "acknowledged . . . ." In the case where the debtor is a limited liability company, the acknowledgment can only be signed by the company's agents.

---

(1) [1930] 2 Ch. 44.

(2) (1840) 11 Ad. & El. 934.

For the defendant company it was contended that a balance sheet is not such a document as can contain or amount to an acknowledgment within the meaning of ss. 23 and 24 of the Limitation Act, 1939. I do not see why that is so. Whether a document is or is not an acknowledgment must depend on what the document states ; and a balance sheet presented to a shareholder creditor at a meeting of the company, as these balance sheets were presented to the plaintiff, fulfils all the requirements of ss. 23 and 24 of the Limitation Act, 1939. That statute does not extinguish debts : it merely bars the right to recover them after the lapse of the specified time from the accrual of the cause of action. If a claim is made for payment of a debt many years after it has been incurred, there may be difficulty in proving that the debt ever was in fact incurred or that it has not already been paid and so forth. That is why the law bars the right of action after a certain period has elapsed from the accrual of the cause of action, but then if there is an acknowledgment of the debt within the terms of ss. 23 and 24 of the Act, the right shall be deemed to have accrued on and not before the date of that acknowledgment. I can see no reason why a balance sheet should not contain a good acknowledgment within the meaning of the Act. The acknowledgment was only of a sum due to a number of unnamed persons ; but the

C. A.

1949

Jones
v.
Bellgrove
Properties
Ld.

Lord Goddard
C.J.

plaintiff established by evidence that he was one of the sundry creditors and that his debt of 1,807*l.* was included in the total sum acknowledged to be due to those creditors. In my view, therefore, the claim was not barred. This case is in accordance with the decision in *In re Atlantic and Pacific Fibre Importing and Manufacturing Co. Ld.* (1). In that case a company issued debentures at various dates between 1890 and 1902 payable within two years. The company paid no part of the principal or interest. The plaintiff in 1928 sued the company on behalf of himself and all other debenture holders for principal and interest and proved that the company's published accounts habitually referred to the debenture debt as outstanding and that in 1925 the accounts which were signed by two directors and the secretary stated the amount of the arrears of interest. It was held that the statement in the accounts was a written acknowledgment of the debt within the meaning of s. 5 of the Civil Procedure Act, 1833, and that the action to recover the principal and interest was not barred by the twenty years period of limitation fixed by s. 3 of that Act. The case of *In re the Coliseum (Barrow) Ld.* (2) is distinguishable. In that case Maugham J. held that the balance sheet of a company which showed that fees were due to the directors and which was signed by those directors did not amount to an "acknowledgment" by the company of the debt since the directors had no authority in such circumstances to bind the company. But Maugham J. said in that case (3): "Had the statement been made in the "balance sheet that the company owed a specified sum to "a shareholder to whom the balance sheet was sent in the "usual way that would have amounted, I think, to a sufficient "acknowledgment within the authorities."

Tucker L.J. I agree.

Singleton L.J. I agree.

Appeal dismissed.

Solicitors for the defendant company: *Kenneth Brown, Baker, Baker.*

Solicitors for the plaintiff: *Harold Miller & Fraser, for Weigall and Inch, Margate.*

(1) [1928] Ch. 836.
(2) [1930] 2 Ch. 44.
(3) Ibid. 47.

C. G. M.

C. A.

1949

July 15, 18, 22, 26.

Evershed M.R., Somervell and Denning L.JJ.

POTTS' EXECUTORS *v.* INLAND REVENUE COMMISSIONERS

Reversed. [1951] A. C. 443

Revenue—Surtax—Settlement—"Body corporate connected with the "settlement"—Company makes payments on behalf of settlor—Sums paid "directly or indirectly to the settlor"—Payment made by "way of loan"—Sums chargeable to tax—Finance Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *ss.* 40, *sub-ss.* 1, 3, 5, 41, *sub-s.* 4 (*e*).

The Finance Act, 1938, by s. 40, provides: sub-s. 1, "Any "capital sum paid directly or indirectly in any relevant year of "assessment by the trustees of a settlement to which this section "applies to the settlor shall (*a*)"—to the extent there stated be treated as the income of the said settlor. Sub-section 3, "For the "purpose of this section, any capital sum paid to the settlor in "any year of assessment by any body corporate connected with "the settlement in that year shall be treated as having been "paid by the trustees of the settlement in that year."

Sub-section 5, "This section applies to any settlement wherever "made and whether made before or after the commencement of "this Act, and in this section—(*a*) the expression 'capital sum' "means—(i.) any sum paid by way of loan or repayment of a loan; "and (ii.) any other sum paid otherwise than as income, being "a sum which is not paid for full consideration in money or "money's worth."

S. W. P. (hereinafter called the settlor) had had for some years, in effect, a current account with P. Ld. a company of which he was sole governing director, the company at his request and on his behalf making various payments of different kinds, such as charitable and club subscriptions and payments in respect of income and surtax out of this account and crediting the account with his directors' fees. The settlor executed a settlement dated March 31, 1939, of the sum of 150,000*l.* in favour of his grandchildren and shortly afterwards the trustees applied the settlement moneys in the purchase from the settlor of all the shares of P. Ld. except one. P. Ld. was "a body corporate connected with the "settlement" within s. 40, sub-s. 3, of the Finance Act, 1938. After the purchase of the shares, the company continued as before to make various payments on behalf of the settlor until his death and the settlor's account was frequently overdrawn in large sums. He paid off such overdrafts from time to time. In the finance years ending April 5, 1940, and April 5, 1941, very substantial sums were paid on account of the settlor by the company and the Special Commissioners ruled that the settlor's estate was liable for surtax in respect of these sums under s. 40, sub-s. 3. Singleton J. had discharged the assessment to surtax in respect of these years:—

Held allowing the appeal, (1.) that the phrase "paid to the "settlor" in sub-s. 3, included payments to him both direct and indirect, (2.) that the sums in question were "paid by way of "loan directly or indirectly to the settlor" and were within the scope of s. 40, sub-s. 3, of the Finance Act, 1938.

APPEAL from Singleton J.

The Special Commissioners had assessed the settlor George William Potts to surtax for the financial years 1939–40 and 1940–41 in respect of sums paid on his behalf by a company known as G. W. Potts Ld. being admittedly a "body corporate "connected with" a settlement made by the settlor within s. 40, sub-s. 3, of the Finance Act, 1938. The settlor having died his executors appealed against the assessment and Singleton J. discharged the assessment. The Crown appealed. The facts are summarized in the head-note and are fully stated in the judgment of the Master of the Rolls.

Pennycuick K.C. and *R. P. Hills* for the Crown. Whether the settlor's estate is liable to pay surtax on the sums paid on his behalf by G. W. Potts Ld. depends on the true interpretation of s. 40, sub-s. 3, of the Finance Act, 1938. It is submitted that the phrase any "capital sum paid to the "settlor" in sub-s. 3 includes payments made indirectly on his behalf, as well as payments made directly to him. It is necessary for the Crown to establish not only that these sums were paid to the settlor but also that they were paid "by "way of loan." It is submitted that the phrase "sum paid "by way of loan" covers this case. It includes a sum paid at the request of the settlor to a third person. If that is wrong, and this is not a loan, the transaction is within the phrase, as the words "by way of" cover not only a loan but transactions of a similar character. There is no judicial definition of what is meant by loan. It is submitted that a loan consists of the provision of money by the lender in consideration of a promise to repay an equivalent amount: see the Oxford English Dictionary. It is essential that there should be a promise to repay. That was the case here. The position of the settlor and this company was similar to that of banker and customer. Where two persons agree that one of them shall provide money for a third person and that the other of them shall repay the moneys so paid that is a loan. These transactions fall within s. 40 and this appeal should be allowed.

R. P. Hills in the same interest. Section 40, sub-s. 3 was intended to meet the device for evading tax by means of loans made to the taxpayer by the machinery of a one man company and a bogus settlement, where both were under the control of the taxpayer. It is admitted that G. W. Potts Ld. is a body corporate connected with the settlement within the definition in s. 41, sub-s. 3 (*e*) of the Act. The opening words of sub-s. 1 of s. 40 gave the key to the succeeding sub-sections. The fact that the draftsman has not repeated the phrase paid "directly or indirectly" in sub-s. 3 is immaterial. It is clear that these words must be read into sub-s. 3. A consideration of s. 38, sub-s. 7 (*c*) and of para. 3 of part II of sch. III of the Act shows that Parliament intended to make no distinction between direct and indirect payments. In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1) Rowlatt J. said that "It is urged that in a taxing Act clear words are necessary "in order to tax the subject. Too wide and fanciful a con-"struction is often sought to be given to that maxim . . . . "It simply means that in a taxing Act one has to look merely "at what is clearly said." He meant that in construing a taxing Act it must be read as a whole, fair weight being given to the words actually used. The court is not being asked to read words into sub-s. 3, but merely to give effect to the obvious intention of the legislature.

Grant K.C., *Talbot K.C.* and *Desmond Miller* for the respondents. This case is not within the mischief at which s. 40 is aimed. If the Crown is right the respondents will be liable to pay surtax amounting to 26,000*l.* because this company let the settlor have 30,000*l.* for one year. Even if he had only had the money for one day, if the Crown's argument is sound, he would have been liable to surtax. This interpretation creates an intolerable hardship. The Crown is trying to stretch the language of s. 40, sub-s. 3, but this being a taxing statute the exact wording used must be construed. It is first submitted that s. 40, sub-s. 3 means what it says and nothing more. If this is wrong and paid "directly or "indirectly" must be read into the sub-section, it is submitted that sums paid at the request of the settlor were not paid to him directly or indirectly. This was a payment to a third party at the settlor's request, such a payment at law is different to a loan. The recipients of the payments were not accountable to the settlor. An indirect payment to a person, means a payment to some one who is accountable to that person. Under the old rules of pleading "money lent" was distinct from "money paid at the request of" a person

(1) [1921] 1 K. B. 64, 71.

C. A.

1949

POTTS' EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

Victors v. *Davies* (1). It is immaterial whether the person requesting the payment to be made was indebted to the payee or not. This is not a case of money paid to the settlor but of money paid at his request. There is a vital legal difference between the two kinds of payment. If the money had been lent by the company to the settlor and he had made the payments he would have been liable to surtax under s. 40 but he is not liable having regard to what was in fact done. The fact that the settlors' account was debited with the payments made which he was liable to repay does not effect the position. For s. 40 to apply the payment must have been to the settlor. "By way of loan" must mean money lent. There is no evidence that these payments by the company were a loan. There was no agreement here to lend money. Money lent and money paid on request have always been different causes of action: see Bullen & Leake, Pleading, 9th ed. 256, 257.

Talbot K.C. in the same interest. The expression "by way "of" is a common expression in taxing Acts. He referred to the Finance Act, 1935, s. 25, sub-ss. 5 and 9, Finance Act, 1938, s. 20, sub-s. 1. The words "by way of" do not add in any way to the meaning of the word "loan."

R. P. Hills in reply. The old rules of pleading are not helpful in construing a statute. The draftsman of a statute would be very unwise to use well known phrases which have a technical meaning to meet a novel situation. Nor is it true to say that the actions for money lent and money paid on request were mutually exclusive.

Cur. adv. vult.

July 26. EVERSHED M.R. read the following judgment: This appeal raises a question of the application of s. 40 of the Finance Act, 1938, to certain sums paid at the request of the deceased Mr. G. W. Potts by a company known as G. W. Potts, Ld., in the financial years ended April 5, 1940, and April 5, 1941. If the section does apply to these payments, then it is conceded that Mr. Potts' estate is now liable for surtax for those years in respect of the payments. The figures have been agreed and after appropriate "grossing up" the assessments are respectively for 50,583*l.* and 5,470*l.*

The material facts as found by the Special Commissioners and stated by them in the special case may be summarized as follows. In March, 1939, Mr. Potts executed a settlement in

(1) (1844) 12 M. & W. 758, 759.

favour of his infant grandchildren in the sum of 150,000*l.* The trustees of the settlement were a company known as Carron Trust Ld., a company wholly owned by the settlor. Shortly after the date of the settlement, namely, April 25, 1939, the trustees applied the settled moneys in the purchase from Mr. Potts of the whole of the issued share capital, save one share, that is 49,999 shares, in the company G. W. Potts, Ld., above mentioned, which I shall hereafter refer to as "the "company." The settlor was at the time the sole governing director of the company, and he continued in that capacity at all relevant dates after the date of the purchase. It is conceded that the company is and was "a body corporate "connected with the settlement" within the meaning of sub-s. 3 of s. 40 of the Act of 1938.

By cl. 3 (c) of its memorandum of association the company was given power, in what is now a common form, to make advances to directors and others. The memorandum of association also contained cl. 3 (w), the usual clause empowering the company to carry on any activities which might conveniently be carried on in connexion with its principal business. In fact for many years prior to the two years in question and during such two years the settlor had, in effect, a current account with the company, the company making on his behalf and at his request numerous payments of various kinds and crediting him in the account with the fees and expenses to which he was entitled as director. A copy of the account in the company's books, which is called the "G. W. Potts, Esq. "director's account," for the years ended December 30, 1939, and December 28, 1940, is annexed to the special case. During the first of those two years the payments made included a considerable number of payments to charities, subscriptions to clubs, motor insurance, weekly cash payments to the settlor and others, and last, but by no means least, payments in respect of income tax and surtax amounting to 13,800*l.* odd. In the second of the two years, which opened with a debit balance of 8,850*l.*, the tax payments amounted to approximately 28,800*l.* There were also a number of cash payments, and at the end of the year the debit balance of the settlor was 32,570*l.* 1*d.* 3*d.*, which the settlor discharged by his cheque on December 23, 1940.

In these circumstances the conclusion of the Special Commissioners, as stated in para. 15 (6.) of the special case, was as follows, so far as is material: "In our opinion the question "whether the payments in question constitute sums paid by "way of loan is a question to be decided upon the facts proved "before us . . . . Upon the facts before us we hold that the "sums paid by the company at Mr. Potts' request are sums "paid by way of loan. If the company was called upon to "justify its action in making the said payments reliance would "have to be placed upon cl. 3 (c) of the memorandum of "association (power to lend money). We therefore hold that "the said payments constitute capital sums and we further "hold that capital sums have been paid indirectly to Mr. Potts, "the settlor. The payments by the company direct to (for "example) the Commissioners of Inland Revenue for surtax "are in substance merely a convenient method which avoided "the necessity of the company paying to Mr. Potts and "Mr. Potts then paying the Commissioners of Inland Revenue. "The capital sums paid by the company must be treated as "paid by the trustees of the settlement (see s. 40, sub-s. 3) "because the company is a body corporate connected with the "settlement (see s. 41, sub-s. 4 (*e*))."

Mr. Grant has directed some criticism to this conclusion. He has said that there is no justification for concluding that the payments were made pursuant to cl. 3 (c) of the memorandum of association. They might equally, for example, have been made by virtue of the general power of sub-cl. (w). He says accordingly that the inference that the sums paid should be treated as loans (an inference based, he contends, on the supposed application of cl. 3 (c) of the memorandum of association) is unsupported by proper evidence, and should be rejected. The various sums paid, according to Mr. Grant's contention, were admittedly sums paid at the request of Mr. Potts, but Mr. Potts' liability to reimburse the company was not for money lent but rested on the footing of a promise to pay implicit in the request, a real and substantial distinction to be found in the old forms of action and the old forms of pleading (see, for example, Bullen and Leake, 3rd ed., at pp. 839–846).

For reasons which later appear, I do not think these criticisms are valid; nor do I think that the solution of the problem rests on the assumption that the company did or did not make payments in exercise of the particular power in cl. 3 (c) of the memorandum of association. The real question on the appeal is, of course, whether on the facts as I have stated them the case is or is not caught by the provisions of s. 40 of the Act of 1938. If it is, the financial result to Mr. Potts' estate is no doubt severe. The claim may or may not have surprised the executors of Mr. Potts, but, as Singleton J. (as he then was) pointed out, we are not concerned with considerations of that kind. I follow the learned judge in citing and bearing in mind the observations of Lord Cairns in *Partington* v. *Attorney-General* (1): "As I understand the "principle of all fiscal legislation, it is this: If the person "sought to be taxed comes within the letter of the law he "must be taxed, however great the hardship may appear to "the judicial mind to be. On the other hand, if the Crown, "seeking to recover the tax, cannot bring the subject within "the letter of the law, the subject is free, however, apparently "within the spirit of the law the case might otherwise appear "to be. In other words, if there be admissible, in any statute, "what is called an equitable construction, certainly such a "construction is not admissible in a taxing statute, where you "can simply adhere to the words of the statute." It is also not to be forgotten, as has been said in this court before, that if the complexity and artificiality of taxing statutes are sometimes regarded as matters of comment and criticism, the blame should be laid not so much on Parliament and the Parliamentary draftsmen as on those private persons who have employed their ingenuity in devising elaborate schemes for avoiding taxes which would otherwise fall on them.

I now turn to the relevant parts of the section. Subsection 1 opens as follows: "Any capital sum paid directly or "indirectly in any relevant year of assessment by the trustees "of a settlement to which this section applies to the settlor "shall (*a*)"—to the extent there stated be treated as the income of the said settlor.

Sub-section 3 is as follows: "For the purpose of this section "any capital sum paid to the settlor in any year of assessment "by any body corporate connected with the settlement in that "year shall be treated as having been paid by the trustees "of the settlement in that year."

Sub-section 5 is as follows: "This section applies to any "settlement wherever made and whether made before or "after the commencement of this Act, and in this section (*a*) "the expression 'capital sum' means (i.) any sum paid by "way of loan or repayment of a loan; and (ii.) any other sum "paid otherwise than as income, being a sum which is not

(1) (1869) L. R. 4 H. L. 100, 122.

" paid for full consideration in money or money's worth," and then there is an exception which is not relevant, and finally (*c*) " references to sums paid to the settlor include references to " sums paid to the wife or husband of the settlor."

The question, therefore, having regard to the concession in reference to the company already stated, is whether the sums paid were capital sums paid to the settlor within the meaning of sub-s. 3. The learned judge thought they were not. He thought that whatever the effect of the definition of a capital sum they were not paid to the settlor. " Bearing in mind," he said, " the words of Lord Cairns, to which I have referred, " I do not regard the payments of surtax, or other payments " to third parties through the current account, as payments " made to the settlor. In making payments of this kind, the " company was carrying out an old practice, and a practice " which existed long before the settlement came into existence. " It was not making payments to the settlor. The making of " the payments for surtax caused a debit against Mr. Potts " on the current account, and he paid that before the end of " 1940. The position created was much the same as that of " banker and customer. If a bank pays a subscription on a " bankers' order when the customer already has an overdraft, " the result is to increase the overdraft. But it is not a payment to the customer; it is rather a payment to someone " else at the request of the customer or for his benefit. Subsection 3 of s. 40 only deals with a capital sum paid to the " settlor." The learned judge, however, indicated his opinion—in case he should be wrong on his main conclusion—that the sums in question were not capital sums paid by way of loan within sub-s. 5 (*a*) (i.), but would have fallen within sub-para. (*a*) (ii.). With all respect to the learned judge, I have formed on these matters a different opinion.

Mr. Pennycuick's first point was that the formula " paid " to the settlor " in sub-s. 3 must in its context be read as meaning " paid directly or indirectly to the settlor." I think, as I read his judgment, that, on this point the learned judge declined to read in the words " directly or indirectly " in sub-s. 3 though a decision on this point may not have been strictly necessary for his conclusion. In my opinion, however, Mr. Pennycuick's argument on this point is correct. My first impression was, I confess, the other way. If there were no other context than that provided by sub-ss. 1 and 3 I should conclude that the omission of the words " directly or "indirectly" in the latter was, notwithstanding the change in the construction of the sentence, deliberate, with the result that sub-s. 3 would be more limited in this respect than sub-s. 1. Nor do I think that reference to the definitions in sub-s. 5, which of course apply equally to sub-ss. 1 and 3, would be sufficient to tip the balance in favour of the Crown's argument. For the effect of the definition sub-section is that wherever you find the words "capital sum" in sub-ss. 1 or 3 you must read in the full definition supplied, and this process does not seem to me necessarily to produce the result contended for by the Crown: but there are other indications. I think it is true to say, as Mr. Pennycuick put it, that direct and indirect payments are both species of the genus "payments to the "settlor." In other words, the phrase "paid to the settlor" is one capable in itself of covering payments of both kinds. If it is to be limited to direct payments only, then the result seems to depend on the absence of the alternative formula in sub-s. 3 which is present in sub-s. 1.

Mr. Hills referred us to sub-s. 2; which is as follows: "For "the purpose of the last foregoing sub-section, the amount of "income available up to the end of any year shall, in relation "to any capital sum paid as aforesaid, be taken to be the "aggregate amount of income arising under the settlement in "that year and any previous relevant year which has not been "distributed, less (*a*) the amount of any other capital sums "paid to the settlor in any relevant year before that sum "was paid," etc. In the opening lines it is, of course, quite obvious that the words "paid as aforesaid" mean and cover payments both direct and indirect, but it is also equally manifest that the words "paid to the settlor" in para. (*a*) must mean payments both direct and indirect. Finally, Mr. Hills referred to the language of para. 3 of Part II of sch. III to the Act. This part of the schedule is related to a different taxing section—s. 38 in the same Part IV. of the Act. By that section the income arising under certain settlements is treated for tax purposes as income of the settlor. By sub-s. 7 (*c*) the section is applied to settlements made before April 27, 1938, subject to the provisions of Part II of sch. III. Paragraph 3 is as follows: "The foregoing pro-"visions of this part of this schedule shall not apply to any "settlement if, in any year to which this part of this schedule "applies, any capital sum within the meaning of s. 40 of this "Act has been paid to the settlor directly or indirectly by the "trustees of the settlement or any body corporate connected "with the settlement in that year." It is plain from the final words of this paragraph that Parliament conceived that for the purposes of s. 40 payments made to the settlor directly or indirectly by a body corporate connected with the settlement were no less liable to be caught by that section than payments made to the settlor directly or indirectly by the trustees of the settlement.

In my judgment, it is in the present case legitimate, in construing s. 40, sub-s. 3, to have regard to the whole of Part IV of the Act, including the schedule to which I have referred. So to do does not seem to me to invoke any "equitable "construction" within the meaning of Lord Cairns' words in the passage I have quoted in his speech. In my view, taking account of all the considerations to which I have alluded, the phrase "paid to the settlor" in sub-s. 3 must, on a fair interpretation, include payments to him both direct and indirect.

This conclusion still leaves the question to which, as I have indicated, most of Mr. Grant's argument was directed, whether the payments here in question were paid to the settlor at all, whether directly or indirectly. I confess that if the question had to be determined apart from the definition sub-s. 5, I should feel much attracted to Mr. Grant's argument. But in my judgment the question cannot be so determined, and if the definition in sub-s. 5 (*a*) (i.) is incorporated, as it must be, into the language of sub-s. 3, then the question becomes: "Were "the sums with which we are here concerned paid by the "company by way of loan directly or indirectly to the "settlor?" Though I think the expression "by way of" may in some contexts involve a somewhat wider meaning than the single word "as", I am prepared to assume that in the present case no material significance can be attached to them.

Nevertheless, it seems to me that on the facts of this case the sums here in question were—according to the ordinary use of language, no less than according to the language of the section—"paid by way of loan directly or indirectly to the "settlor." It does not seem to me in such a context that any weight can be attached to the old distinction, reflected in the old forms of pleading, between money lent and money paid on request. Whether or not the company must be taken to have acted in exercise of its powers under cl. 3 (c) of the memorandum of association, it is, I think, abundantly plain, as the special case found and as the judge below also stated, that the company acted for practical purposes exactly in the office of the settlor's banker. On January 1, 1939, the account was in credit to the extent of 1,316*l.* 7*s.* 4*d*; but on January 18, 1,350*l.* 7*s.* 4*d.* was transferred to the settlor's private banking account and thenceforward the settlor's account with the company was continuously overdrawn (that is, throughout the whole financial year 1939–40 and thereafter till December 23, 1940). In the ordinary case of banker and customer, where the former gives credit to the latter by meeting the cheques from time to time drawn by the customer upon the banker, the resulting overdraft is always regarded as money lent by the banker to the customer. See, for example, the language of Lord Cozens Hardy, M.R., in the case of *Cuthbert* v. *Robarts, Lubbock & Co.* (1), where he says: "If a customer draws "a cheque for a sum in excess of the amount standing to the "credit of his current account, it is really a request for a loan, "and if the cheque is honoured the customer has borrowed "money." In the same way, as it seems to me, the various payments made by the company throughout the period in question ought fairly to be regarded as money paid directly or indirectly by way of loan to Mr. Potts within the meaning of the sub-section. The problem is, I think, largely one of first impression and I do not attempt to improve on my conclusion by elaboration. In my judgment, the Crown succeeds in showing that the sums for which it is sought to tax the settlor are within the scope of the section which the Crown invokes.

In the circumstances, it is strictly unnecessary for me to express an opinion on the scope of para. (ii.) of the definition sub-s. 5 (*a*). But since the matter has been argued, my own view is that the sums in question do not fall within its ambit. Mr. Pennycuick did not himself at all attempt to justify the view to which the learned judge felt himself inclined—that a promise to repay was not money or money's worth within the meaning of the paragraph because the last two words indicated goods or property. He sought rather to say that in the absence of a charge for interest, that is a charge for the use of the sums advanced, there was no "full" consideration. I cannot for myself accept that argument. The formula "full "consideration for money or money's worth" is common enough and is generally used to exclude, for example, the marriage consideration. But in my view the settlor's promise

(1) [1909] 2 Ch. 226, 233.

or obligation to repay in full the sums paid on his behalf constitutes full consideration in money or money's worth within the meaning of the paragraph in question.

The result, however, in my judgment, is that the appeal succeeds.

SOMERVELL L.J. : I agree that the appeal succeeds for the reasons which have been given by the Master of the Rolls.

DENNING L.J. : I also agree.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors : *Solicitor of Inland Revenue ; Allen & Overy.*

B. A. B.

EDGWARE ESTATES LD. *v.* COBLENTZ.

C. A.
1949
July 25, 26.
Evershed M.R., Somervell and Denning L.JJ.

Landlord and tenant—Rent restriction—Standard rent—Head-lease at rent of 300*l.—Covenant against sub-letting without landlord's consent—On January* 1, 1939, *premises in occupation of sub-tenant at a rent of* 225*l.—Sub-letting in breach of covenant—In* 1943 *landlord waives breach of covenant—Unlawful sub-letting to be disregarded—Standard rent* 300*l.—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), s. 5, *sub-s.* 5, *s.* 12, *sub-s.* 1 (*a*) ; *s.* 15, *sub-s.* 3.

By a lease dated October 12, 1926, the predecessor in title of the appellant let a dwelling-house, which was brought within the Rent Restrictions Acts by the Act of 1939, to W Ld. for a term of twenty-one years at an annual rent of 300*l.* That lease contained a covenant that the lessees would not sub-let the premises without the consent in writing of the landlord. There was the usual provision for forfeiture and re-entry on breach of covenant. In 1934 the landlord gave a licence to W Ld. to sub-let the premises to C at an annual rent of 225*l.* That licence only authorized a sub-letting for one year. In fact C remained in possession as tenant from year to year at the rent of 225*l.*, and was still in possession on September 1, 1939. Such tenancy from year to year, constituted a breach of the covenant in the head-lease and the sub-tenancy was accordingly unlawful. In 1943 the landlord waived his right of re-entry for breach of covenant and when the head-lease determined in 1947 the sub-letting was a lawful sub-letting. The sub-tenant's widow applied under s. 11 of the Act of 1923 to have the standard rent of the premises determined. The county court judge held that the standard rent was 225*l*. The appellants, the present owners of the premises, appealed, contending that the standard rent was 300*l*.

Held, allowing the appeal, that the sub-tenant who was in possession on September 1, 1939, was not a lawful sub-tenant for the purposes of the Rent Restriction Acts and the fact that the landlord subsequently waived his right to re-enter did not operate retrospectively to make that sub-tenancy a lawful sub-tenancy on September 1, 1939. In the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended), s. 12, sub-s. 1 (*a*), " standard rent " means the rent at which the premises were lawfully let on September 1, 1939. Accordingly, in this case as the sub-tenancy was an unlawful sub-tenancy on September 1, 1939, the standard rent was 300*l*. per annum the rent payable under the head-lease.

Glossop v. *Ashley* [1922] 1 K. B. 1, distinguished.

Norman v. *Simpson* [1946] K. B. 158, considered.

APPEAL from Willesden county court.

By a lease dated October 12, 1926, Henry Frederick Hand demised a dwelling-house No. 7 Bank Parade, Edgware, for twenty-one years to W. White & Sons (Cricklewood) Ld. (hereinafter called " Whites ") at a rent rising to 300*l*. per annum. That lease contained a covenant by the lessees that they would not underlet or part with possession of the premises without the consent in writing of the lessor. The lease contained the usual provision for forfeiture and re-entry on breach of covenant. By licence dated December 19, 1934, the lessor authorized Whites to sub-let the premises for one year to Isaac Coblentz and pursuant to that licence by an agreement dated December 31, 1934, Whites let the premises to Isaac Coblentz for one year at a rent of 225*l*. per annum. At the expiration of his year's tenancy Isaac Coblentz remained in possession as yearly tenant and was in possession on September 1, 1939, when the premises were brought within the provisions of the Rent Restriction Acts by the Act of 1939. It was conceded that at that date the sub-tenancy of Isaac Coblentz was " unlawful " within s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920 as " unlawful " had been defined in *Norman* v. *Simpson* (1).

In 1943 the then landlord waived his right of re-entry in respect of the sub-letting, which was accordingly at the date of the determination of the lease to Whites in 1947 a lawful sub-letting.

---

(1) [1946] K. B. 158.

Isaac Coblentz having died, his widow, who was in actual occupation of the premises, applied under s. 11 of the Rent Restrictions Act of 1923 to have the standard rent determined. The appellants, Edgware Estates Ld., the successors in title of the original lessor, were defendants to the application. The county court registrar found in favour of the appellants fixing the standard rent at 300*l*. The county court judge reversing his decision, held the standard rent to be 225*l*., the rent payable under the sub-tenancy. The landlords appealed.

Heathcote-Williams K.C. and *R. N. Bibby-Trevor* for the appellants, the landlords. The standard rent of these premises is 300*l*. per annum. "Standard Rent" is defined in s. 12, sub-s. 1 (*a*), of the Act of 1920 (1). The standard rent of these premises was fixed once and for all in September 1, 1939. The standard rent once fixed operates in rem: *Field* v. *Gover* per Goddard L.J. (2). The decision in *Lazarus-Barlow* v. *Regent Estates Ld.* (3) does not affect this question. There cannot be two standard rents. On September 1, 1939, the sub-tenancy was an unlawful sub-letting. It accordingly must be disregarded and the rent of 300*l*. payable under the head-lease is the standard rent. Nothing that happened after September 1, 1939, can affect the standard rent which became fixed on that day. He referred to *Conqueror Trust Property Ld.* v. *Barnes Corporation* (4) and *White* v. *Richmond Court Ld.* (5).

It is contrary to the whole intention of the Rent Restriction Acts to fix the standard rent by reference to a sub-tenancy which is unlawful when the sub-tenant under such a letting would not himself be entitled to the protection of the Acts: *Glossop* v. *Ashley* (6); *Prout* v. *Hunter* (7). The object of the Acts is to protect lawful tenants. He referred to *Norman* v. *Simpson* (8).

R. N. Bibby-Trevor in the same interest. The only authority for saying that the standard rent must be fixed by reference

---

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1, as amended, provides in the case of houses controlled by the Act of 1939: "(*a*) the expression "'standard rent' means the rent "at which the dwelling-house "was let on September 1, 1939."

(2) [1944] K. B. 200, 212.

(3) [1949] W. N. 279.

(4) [1944] K. B. 96.

(5) [1944] K. B. 576.

(6) [1922] 1 K. B. 1.

(7) [1924] 2 K. B. 736.

(8) [1946] K. B. 158.

C. A.

1949

Edgware Estates Ld.
v.
Coblentz.

to the rent paid by the tenant in actual occupation is *Glossop* v. *Ashley* (1). That case is distinguished from this. There the sub-letting was lawful. It is accordingly necessary to go back to the last lawful letting which is the lease of 1926, under which the rent payable is 300*l.*

Stranders for the respondent, the tenant. First it is contended that the right inference from the facts is that the under-letting was duly licensed by the head landlord. Secondly, it is contended that as the landlord in 1943 waived his right to forfeit the lease he is now precluded from saying the sub-letting was unlawful on September 1, 1939. Thirdly, it is submitted that whether the sub-letting was lawful or not it fixed the standard rent. A sub-tenancy granted in breach of covenant is liable to defeasance but is nevertheless a valid sub-tenancy. The Rent Restriction Acts are intended to protect tenants in occupation. It is necessary now to decide what was the rent in 1939 in the light of the facts as they are now known. It is now known that the sub-tenancy which was once unlawful became lawful. There may be a distinction between the position of a landlord who waives his right of forfeiture, where there has been an unlawful sub-letting, and one who asserts his rights. If the standard rent is not fixed by reference to the rent of the sub-tenancy, the court will not be giving effect to the principle laid down in *Glossop* v. *Ashley* (1). If the sub-tenancy has to be ignored, it is necessary to look back to the last lawful letting which was the sub-letting under licence to Isaac Coblentz at a rent of 225*l.* with the result that on this footing also the standard rent is 225*l.* In the definition of "standard rent" in s. 12, sub-s. 1, of the Act of 1920 it is not stated that the letting must be "lawful" as is stated in s. 5, sub-s. 5, and s. 15, sub-s. 3. Section 12, sub-s. 1 (*a*), deals with the point of time when the tenant's lease comes to an end. When this sub-tenancy came to an end it was a lawful sub-tenancy.

Heathcote-Williams K.C. in reply. The decision in *Glossop* v. *Ashley* (1) supports the appellant's case, as it shows the manner of deciding between competing lawful tenancies.

Evershed M.R. The first point taken before us for the respondent was that there was in truth no evidence on which could be justified the finding that there was a breach of covenant at the material date, namely, September 1, 1939,

(1) [1922] 1 K. B. 1.

and it was said that this court ought to hold that the sub-letting to Isaac Coblentz on that date, and indeed at all material times, was lawful. It is true that the learned county court judge stated that he suspected or guessed that the landlord for the time being may well have known all about Mr. Coblentz's tenancy at the time; but on the evidence before him and the admissions which were made before the learned registrar and before the county court judge, he was unable to give effect to any guess in which he might otherwise have indulged and reached the conclusion that there was in fact a breach of covenant. Mr. Stranders argued that there was no ground on the evidence to justify such a conclusion. It is, in my judgment, impossible for us to accede to this argument and to hold otherwise than in accordance with the findings of the learned county court judge.

In this state of affairs the argument of Mr. Heathcote-Williams for the appellant owners, the landlords, has been briefly this. He says that the court ought not to pay, and cannot pay, regard to what was at the material date, namely, September 1, 1939, an unauthorized sub-letting, defeasible at the suit of the owners of the property, a sub-letting which was in fact, as we must assume from the finding, unknown to the landlords and certainly not binding on them. Mr. Heathcote-Williams has said that were it otherwise very strange results would follow; for example, as he says, notwithstanding that a landlord might have protected himself by a covenant against sub-letting without his consent, still the standard rent might be fixed at a figure contained in and by reference to a sub-letting of which he at the material date was entirely ignorant and which constituted a breach of the covenant which he had in his lease; and in that event it might, of course, happen that the rent which he, the landlord, was charging under the head-lease might prove to be excessive so that he would be liable to have a claim against him for recovery of the over-payment. On the other hand, Mr. Stranders has said that if you look at the terms of s. 12, sub-s. 1 (*a*), there is no reference in it to "lawfully" sub-let or "lawfully" let in contrast to s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920 where the word "lawfully" is used. He says, and says truly, that this was on the evidence a bona fide letting at a genuine rent, and for the purpose of occupation. He says that the intention of the Act is to protect the occupying tenant from eviction and from increases of his rent, and that the

C. A.

1949

EDGWARE ESTATES LD. *v.* COBLENTZ.

Evershed M.R.

intention of this section in particular is to fix the standard rent by reference to the rent payable in such cases by the occupier. Mr. Stranders further says that in any event the waiver in 1943 prevents the landlords now from asserting that the sub-tenancy to Coblentz on September 1, 1939, was not a lawful sub-letting.

Mr. Heathcote-Williams in the course of his argument put the case at one time thus: that the state of affairs as they were in truth on September 1, 1939—for that is the relevant date—can in no circumstances be affected by events subsequent to that date. That, I think, is, if I may say so, putting it far too high. Things might happen after that date as a result of which a landlord might well be estopped from asserting otherwise than that a tenancy existing on September 1, 1939, was a lawful tenancy, and it is possible to imagine that in this case had the facts been more fully gone into such an estoppel might possibly have been raised. But we have to deal with this case on the facts as proved and as found by the learned county court judge.

The case is one of difficulty, but on the whole I have reached a conclusion favourable to the argument of Mr. Heathcote-Williams. In the first place, it is to be noted that s. 12, sub-s. 1 (*a*), appears to contemplate one letting. It simply refers to the rent at which the dwelling-house was let. Of course, the effect of the definition in sub-para. (*g*) is that you have to read into sub-para. (*a*) "any sub-letting" as well as "any letting" that existed at the relevant date; but on the face of the paragraph as it stands I would not, I confess, expect to find any reference to "lawfully" or "unlawfully" let. Then, secondly, in any event some limitation must (as is conceded and as is indeed obvious) be placed upon the words "was let" at the material date. For example—as has been held in this court—the letting must be a genuine letting. A transaction devised merely in order to create a standard rent of a particular figure would be disregarded for the purposes of this paragraph. Further (and I think this is more important) the letting must be a letting for the purposes of the Act. It has been a matter for decision in these courts that a letting of the dwelling-house furnished would not be effective for the purpose of para. (*a*), because such a letting would not be a letting for the purposes of the Act. It would be a letting outside the general scope of the Act. Thirdly, once you introduce into the picture the conception of the purposes of the Act, it seems to me vital to have in mind that it is not every sub-tenant whom the Act is designed to protect. I have already referred to s. 5, sub-s. 5, and s. 15, sub-s. 3 of this Act. These sub-sections are sufficiently well known, and it is not necessary for me to read them, but it has been decided that by virtue of those sub-sections an occupying sub-tenant is protected and is entitled to remain in possession provided that at the relevant date—which prima facie would be when proceedings are started for possession—he can show that he is a lawful sub-tenant in the sense in which that term has been interpreted by Morton L.J. in *Norman* v. *Simpson* (1).

At the date at which we are directed to look, namely, September 1, 1939, Mr. Coblentz was a sub-tenant not entitled to the protection of the Act; he was at that date within the meaning of the Act an unlawful sub-tenant. In my view, the fact that at a later stage the landlords waived, that is abandoned and lost, their rights to re-enter cannot operate retrospectively to make Mr. Coblentz a lawful sub-tenant within the meaning of the Act on September 1, 1939. Therefore, it seems to me to follow that in considering what rent you look at, you cannot regard the sub-letting to Coblentz because it was not a sub-letting for the purpose of the Act any more than a letting or sub-letting furnished would be a letting for the purposes of the Act. Considerable reliance was placed both here and below on the case of *Glossop* v. *Ashley* (2). That was a case in which there were in truth two competing lettings, because both of them were within the scope of the Act, and were for the purpose of the Act; in other words, the sub-tenancy was not a sub-tenancy in breach of covenant and was not therefore what is called an unlawful sub-tenancy. In that state of affairs the question was, to which of those competing sub-tenancies do you have regard? And this court held, to the sub-tenancy, because the emphasis, in those circumstances, must be placed on the position of the occupier. If I may read one or two short passages from the judgments; Bankes L.J. said this (3): "The standard rent is the rent which that tenant"—that is the occupying tenant—" was paying at that date"—which was the date which is now replaced by September 1, 1939—" because he is the person whom the legislature was intending

---

(1) [1946] K. B. 158.

(2) [1922] 1 K. B. 1.

(3) Ibid. 7.

C. A.

1949

EDGWARE ESTATES LD. *v.* COBLENTZ

Evershed M.R.

"to protect when it fixed the standard rent." Then Scrutton L.J. observed (1): "The object of the legislation "was to protect the tenant in occupation and allow him to "remain in possession as long as he pays the rent he was "paying" on the date in question. Finally, Atkin L.J. said (2): "In my view it is the tenant's right that is protected, "and when I consider s. 15, sub-s. 3, and its obvious intention "to secure the sub-tenant as far as possible in the position he "would have occupied if his relation to his former landlord "had continued, I cannot reconcile that sub-section with the "argument for the appellants," who were the head landlords. As I read those passages the ratio really is in each case that the sub-tenant was a person whom the Act was designed to protect, and it was therefore for that reason that you regarded the rent he paid as the material rent for fixing the standard rent. Once you arrive at the conclusion that the sub-tenant in occupation was not at the material date a person who was entitled to the protection of the Act at all, then it seems to me that the basis of the reasoning is destroyed. In other words, I take the case of *Glossop* v. *Ashley* (1) as applicable only where you have two competing tenancies in the sense that of neither of them can it be said that they are outside the scope and protection of the Act as being unlawful tenancies. And I think that conclusion also answers another point raised in argument which was this: It was said: "Well, assume "that the sub-tenancy to Coblentz on September 1, 1939, "must be disregarded for the purpose of fixing the standard "rent, nevertheless, Coblentz actually was in occupation. "At the material date, September 1, 1939, there was, therefore, "no letting to an occupying tenant, and you must start "retracing your steps beyond that date, and, if you do, you "quite soon arrive at the licensed sub-letting to Coblentz "in 1935"—that was the sub-letting at the rent of 225*l.* a year. As I have indicated it seems to me that an argument of that kind, based on the decision in *Glossop* v. *Ashley* (1) only comes into play, so to speak, when you have got competing tenancies. Here, if the sub-tenancy is out of the picture, you are left with a perfectly proper tenancy by the appellants or their predecessors to Whites, which was a letting which seems to me to fall within the language of the paragraph as a letting of the premises as a dwelling-house; and, in these circumstances, that is the letting by reference to which the standard rent ought to be fixed. In this case the result is one which favours the landlord because it so happens, and it is by no means common, or so I take it, that the rent payable under the head-lease is in excess of the rent payable under the under-lease. It may very well be the result in other cases would be the other way round, and the result would be favourable not to the landlord but to the tenant. Those, however, are not considerations which ought to influence the decision of the court. The question is what on the facts is the effect of the provision of para. (*a*) of s. 12, sub-s. 1, of the Act of 1920, and I conclude, for the reasons which I have tried to state, that the result is that the standard rent must be fixed by the letting at 300*l*. per annum from the appellants' predecessor in title to Whites.

---

(1) [1922] 1 K. B. 1, 8.

(2) Ibid. 10.

SOMERVELL L.J. Although this appeal raises questions of some nicety and we are disagreeing with the learned judge, there is nothing I can usefully add to the judgment which has been delivered by the Master of the Rolls, which completely expresses my own reasons in coming to the conclusion that this appeal succeeds.

DENNING L.J. Speaking generally the Rent Restriction Acts now in force have two primary objects: The first is to stabilize rents at the 1939 level, the second, to protect occupiers from eviction.

The first object is achieved by prescribing a "standard "rent" which is, in most cases, the rent at which the house was let, on September 1, 1939, to the occupying tenant: *Glossop* v. *Ashley* (1). This standard rent is the maximum which can be charged not only during any statutory tenancy of the house, but also during any contractual tenancy: *Carter* v. *S. U. Carburettor Co.* (2); and *Field* v. *Gover* (3). It is not only the maximum as between the occupying tenant and his immediate landlord, but also between a mesne tenant and his superior landlord: *Carter* v. *S. U. Carburettor Co.* (2). It is a maximum which binds not only the persons who were interested in the house on September 1, 1939, but all those who acquire an interest after that date, and it is the sum which every tenant or sub-tenant can be required to pay if he stays in possession by virtue of the statute irrespective of any prior

(1) [1922] 1 K. B. 1.
(2) [1942] 2 K. B. 288.
(3) [1944] K. B. 200, 212.

contractual terms as to the amount: *Phillips* v. *Copping* (1); *Regional Properties Ld.* v. *Oxley* (2). By reason of those qualities the standard rent is said to operate in rem. This does not mean that a decision between two persons as to its quantum is a decision in rem which is binding on persons who were not parties to the decision, but it does mean that the correct amount is binding on all persons interested in the house, whenever and however their interest was acquired.

The second object is achieved by prohibiting the court from making any order for possession unless certain specified conditions are satisfied.

We have here the case of a head landlord, a mesne tenant and a sub-tenant. So far as possession is concerned the Act makes it clear that the only sub-tenants who are protected from eviction after the head tenancy comes to an end are sub-tenants to whom the premises have been lawfully sub-let. (Section 5, sub-s. 5, and s. 15, sub-s. 3.) But the Act is not so specific so far as the standard rent is concerned. In my opinion the only sub-tenancies which can be regarded for the purpose of ascertaining the standard rent are lawful sub-tenancies, that is, sub-lettings which are not in breach of any term of the head-lease. It is impossible to suppose that a mesne tenant could, by unlawfully sub-letting the house in August, 1939, saddle the landlord with a standard rent which was lower than the head-rent. On discovery of the breach the head landlord could plainly forfeit the head-lease and eject the unlawful sub-tenant. It cannot be supposed that, after strong action of that kind, he would, nevertheless, be bound by the figure contained in the unlawful sub-letting.

The difficult question is, however, what is the effect of the head landlord accepting rent after knowledge of the unlawful sub-letting? So far as possession is concerned, it is clear that if the head landlord, during the subsistence of the contractual head-lease, waives the forfeiture, the sub-letting thenceforward becomes a lawful sub-letting: *Norman* v. *Simpson* (3); and *Watson* v. *Saunders-Roe* (4). The material date for determining whether it is unlawful for that purpose is the date of the determination of the contractual tenancy. But, so far as the standard rent is concerned, the material date is September 1, 1939, and the lawfulness or unlawfulness of the sub-letting must be determined as at that date. As

(1) [1935] 1 K. B. 15.
(2) [1945] A. C. 347.
(3) [1946] K. B. 158.
(4) [1947] K. B. 437.

Goddard L.J. said in *Field* v. *Gover* (1): "The standard "rent attaches from the moment when the house is brought "under control." Take a case like the present where there was no waiver of the forfeiture until 1943. If an application had been made in 1941 to determine the standard rent the figure would be 300*l.* The head landlord would not be tied down to the figure contained in the unlawful sub-letting of which ex hypothesi he knew nothing. Suppose, then, after the waiver in 1943 another application was made to fix the standard rent, can it be supposed that the 300*l.* would be replaced by 225*l.*? Certainly not. A subsequent waiver is therefore of no effect on the standard rent.

In this case, on the facts found by the county court judge, the sub-tenancy which existed on September 1, 1939, was unlawful. It is therefore to be disregarded for the purpose of ascertaining the standard rent. The only relevant letting at September 1, 1939, was the letting at 300*l.* a year, and that is, therefore, the standard rent.

I agree the appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker; Matthew Trackman & Co.*

B. A. B.

---

(1) [1944] K. B. 200, 212.

OLIVER *v.* DAVIS AND ANOTHER.

C. A.
1949
July 11, 12.
Evershed M.R., Somervell and Denning L.JJ.

Bill of exchange—Cheque—Cheque stopped—Action by payee against drawer—Defence of want of consideration—Alleged payment in respect of past debt of third party—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 27, *sub-s.* 1 (*b*).

The Bills of Exchange Act, 1882, s. 27, sub-s. 1, provides: "Valuable consideration for a bill may be constituted by (*a*) any "consideration sufficient to support a simple contract; or "(*b*) an antecedent debt or liability . . . ."

Held, that to satisfy sub-s. 1 (*b*) the antecedent debt or liability must be either that of the promisor or drawer of a bill or cheque or, if of a third party, then at least there must be some relationship between the receipt of the bill or cheque and the antecedent debt or liability such as forbearance or a promise to forbear, express or implied, on the part of the recipient in regard to the third party's debt or liability.

Crears v. *Hunter* (1887) 19 Q. B. D. 341, applied; *Currie* v. *Misa* (1875) L. R. 10 Ex. 153; and *Baker* v. *Walker* (1845) 14 M. & W. 465, discussed.

APPEAL from Finnemore J.

The first defendant (who was a man called William R. Davis and is hereafter referred to as Davis) became acquainted with the second defendant, Miss Marjorie Woodcock (hereafter called the defendant) and her sister Miss Ethel Woodcock, who lived at a café at Egham belonging to the defendant. For some years Davis lodged at the café and worked first, for the plaintiff, Sydney Alfred Oliver and afterwards for other persons. In 1947 Davis and Miss Ethel Woodcock became engaged, and on May 28, 1947, they entered into an agreement for the purchase of a furnished bungalow in the neighbourhood for 2,000*l.*, the purchase to be completed on July 15, 1947. They arranged to share the purchase price and to have the bungalow conveyed to them jointly. Davis paid the deposit of 200*l.* but no more, although Miss Ethel Woodcock handed him her savings of 650*l.* towards the purchase price. In May or June Davis made out in the presence of the sisters a cheque for 1,847*l.* for the completion of the purchase and wrote a covering letter to the vendor's solicitor, but he never sent them. He was, in fact, a married man and he later left the place, after which the cheque and letter were found in a coat he left behind. In July Davis had approached the plaintiff for a loan of 350*l.* said to be needed for completing the purchase and received a cheque dated July 15 for that amount, which he cashed. In return he gave the plaintiff a post-dated cheque for 400*l.* dated August 8. On August 19 Davis, while ill in bed, told the defendant and Miss Ethel Woodcock that he was in a difficulty about repaying the plaintiff. As a result, the defendant made out a cheque in favour of the plaintiff for 400*l.* and gave it to Davis to hand over to the plaintiff. The plaintiff was away and Davis and his fiancée handed the cheque in an envelope to the plaintiff's wife. The defendant said in evidence that she drew the cheque because Davis had induced her to think the money advanced by the plaintiff had been applied towards buying the bungalow, and that if it was left unpaid the furniture in the bungalow would be taken. On August 22, the plaintiff returned home and then received the cheque. On the same day the defendant stopped payment of her cheque and told the plaintiff she had done so. It had that day been ascertained that Davis had never paid for the bungalow and had kept Miss Ethel Woodcock's money. Davis had gone off to Gloucester, but it was still hoped that he would return with money and pay the plaintiff. Next day the plaintiff presented Davis's cheque for 400*l.*, which was dishonoured. Subsequently the plaintiff presented the defendant's cheque which was dishonoured.

On October 30, 1947, the plaintiff commenced proceedings by specially indorsed writ against Davis and the defendant originally claiming payment on both cheques but afterwards amending so as to make it an alternative claim. The particulars of claim against the defendant set up the case that the plaintiff's consideration for the cheque was his promise to release Davis from liability in respect of his earlier cheque and to refrain from proceeding against Davis in respect of that cheque. The defendant obtained leave to defend. By her defence the defendant denied her indebtedness to the plaintiff and contended (1.) that there was no consideration for the cheque, or (2.) that she paid the cheque in mistake of fact, the particulars of which were that she thought Davis was free to marry her sister, that the defendant had borrowed 400*l.* from the plaintiff to help pay for the bungalow and its contents, that the furnished bungalow had been paid for in full, and that unless the plaintiff was repaid, the furniture at the bungalow would be lost; or (3.) that the defendant was induced to draw the cheque and let the plaintiff have it by the fraud of Davis.

Finnemore J. held (1.) that the cheque was drawn in favour of the plaintiff in respect of an antecedent debt or liability within s. 27, sub-s. 1 (*b*) of the Bills of Exchange Act, 1882, the antecedent debt or liability being that of Davis to the plaintiff; (2.) that the defence of mistake of fact did not hold for the alleged mistake of fact related to Davis and not the plaintiff. A mistake of fact which entitled the defendant to take back money must be a mistake of fact which, if correct, would have made her responsible to pay the plaintiff; and (3.) that the defence that the payment was induced by fraud was not a valid defence as it might have been if Davis had fraudulently persuaded the defendant to think that she owed the plaintiff 400*l.*

The defendant appealed.

A. L. Stevenson for the defendant. There was no consideration for the defendant's cheque within the Bills of

Exchange Act, 1882, s. 27, sub-s. 1 (*b*). Here the antecedent debt of Davis is relied on as antecedent consideration within sub-s. 1 (*b*), but there must, where the antecedent debt of a third party is relied on, be some direct connexion between the giving of the cheque and the third party. Here the plaintiff on his own evidence knew nothing of the reason why the cheque was sent to him until he saw the defendant and was told that the cheque had been stopped for very good reasons, nor could it be suggested that the payment of the cheque produced any forbearance in enforcing Davis's liability for his cheque was presented next day. There was then no prior consideration, *Crears* v. *Hunter* (1), Byles on Bills (1939 ed.) p. 133 and *Crofts* v. *Beale* (2). No inference is to be drawn from the fact that Davis and the defendant's sister took the defendant's cheque to the plaintiff's house. It would be just the same if the defendant had put the cheque in a stamped envelope and asked Davis to post it. There was clearly then no prior consideration.

Further the defendant is not liable because the payment of the cheque was made in mistake of fact and also was induced by fraud. As to the position when the drawer of a cheque is induced by fraud to sign it, see *Ayres* v. *Moore* (3). It was there held that as the acceptance of bills of which the plaintiff was the original payee was induced by the fraud of a third party, the drawer, as the defendant, was entitled to repudiate liability on that ground. If the defendant's cheque in favour of the plaintiff has been honoured, she would have been entitled to recover the amount on the ground that payment was made in mistake of fact.

[Evershed M.R. In so far as the defendant was told by Davis that he was indebted to the plaintiff there was no mistake of fact.]

It is true that the mistake was as to circumstances of Davis's borrowing, but in addition he told the defendant that unless the plaintiff was paid he would be entitled to enforce Davis's debt by taking the furniture at the bungalow.

[Denning L.J. For the defence of mistake of fact to be available, the mistake must be as between the plaintiff and the defendant.]

In spite of the fact that the cheque was made out and handed over to a person knowing nothing of the fraud, the defendant is entitled to succeed because she had stopped the cheque: see *R. E. Jones Ld.* v. *Waring & Gillow Ld.* (1).

---

(1) (1887) 19 Q. B. D. 341, 346.

(2) (1851) 11 C. B. 172.

(3) [1940] 1 K. B. 278.

[SOMERVELL L.J. The defendant did not think that she her sister was under any liability.]

No, but she believed that she was relieving her sister, with whom she was closely associated by saving her from losing the furniture at the bungalow.

Beney K.C. and *Neil Lawson* for the plaintiff.

[EVERSHED M.R. We do not want now to hear you on the defences of mistake of fact and fraud.]

On the question of consideration for the defendant's cheque, she thought that 400*l.* had been borrowed from the plaintiff to pay part of the consideration for the bungalow and she was in fear that unless Davis's debt was paid the furniture at the bungalow would be taken in satisfaction.

[EVERSHED M.R. There is no evidence that the plaintiff knew anything about this.]

Even though he did not say so in evidence, it is inconceivable that he did not think the defendant's cheque had to do with Davis's debt. It is true that the plaintiff in his evidence never said a word about the cheque being intended to pay Davis's debt; but the defendant in her evidence said that her cheque was intended to prevent the furniture at the bungalow being taken in satisfaction of Davis's debt. It makes no difference that when the plaintiff saw the defendant he was told that this had been the original intention but that she had changed her mind for very good reasons and had stopped the cheque.

[EVERSHED M.R. The plaintiff had then in no way altered his position and he presented Davis's cheque for payment next day.]

The case is one in which a promise to forbear should be implied, and that is sufficient consideration: *Popplewell* v. *Wilson* (2), *Sowerby* v. *Butcher* (3), *Cook* v. *Long* (4) where family affection was held to be sufficient, *Baker* v. *Walker* (5), *Crofts* v. *Beale* (6) and *Ayres* v. *Moore* (7). There may have been no express agreement by the plaintiff to forbear from enforcing Davis's liability, but the plaintiff accepted the defendant's cheque in satisfaction of that liability. Any

---

(1) [1926] A. C. 670.
(2) (1720) 1 Strange 264.
(3) (1824) 2 Cr. & M. 360, 372.
(4) (1842) Car. & Mar. 510.
(5) (1845) 14 M. & W. 465.
(6) 11 C. B. 172.
(7) [1940] 1 K. B. 278.

C. A.
1949
OLIVER
v.
DAVIS.

subsequent acts not according with this were due to the defendant having stopped the cheque. The title, however, of a creditor to deal with a cheque paid in respect of an antecedent debt or liability is indefeasible, *Currie* v. *Misa* (1). It is enough that the defendant in drawing the cheque was actuated by a desire to save her sister from the feared result of Davis's liability. That is good consideration, and it does not matter what the plaintiff's subsequent actions were. The vital matter is what was the consideration for drawing the cheque. Is it not enough in any case, if the cheque was handed over in the hope that the plaintiff might release Davis's debt? *Crears* v. *Hunter* (2) dealt with a case where the matters in question preceded the passing of the Bills of Exchange Act, 1882, and cannot be relied upon.

No reply was called for.

EVERSHED M.R. This is an appeal from an order of Finnemore J. whereby the second defendant in the action, Miss Marjorie Woodcock, was ordered to pay the plaintiff, Mr. Oliver, the sum of 400*l.*, the amount of a cheque on which the plaintiff has sued. [His lordship then stated the facts.]

The facts are very remarkable. As I have said the appellant, Miss Marjorie Woodcock, plainly acted with lack of the most elementary prudence. Mr. Oliver on his part appears to have observed a no less remarkable reticence. The end of the transaction was that he was in possession both of Davis's cheque and Miss Woodcock's. It was not apparently suggested to him, certainly he never suggested it himself, that either cheque at any stage ought to be returned by him to her. He sued both Davis and Miss Woodcock, as I have indicated, and I do not forbear to mention that in the writ as originally served he sued them both cumulatively on their cheques. That form of action he amended by suing alternatively, and he gave by way of particulars of claim against the second defendant, the present appellant, that the consideration for her cheque was his promise to relieve the first defendant from liability in respect of his prior cheque. Since he had joined the first defendant as a party to the action and was suing him, it is perhaps not surprising that those particulars were quite incapable of being supported and were in fact abandoned. The plaintiff has proceeded against the appellant; and against her he relies on ss. 30 and 55 of the

(1) (1875) L. R. 10 Ex. 153.

(2) 19 Q. B. D. 341.

C. A.

1949

OLIVER v. DAVIS.

Evershed M.R.

Bills of Exchange Act, 1882, and in the alternative (in effect) upon s. 27 of that Act, on the ground that the consideration for the cheque was the antecedent debt or liability of the first defendant, Davis.

Two answers to the claim have been put forward, the first being that upon its proper construction, and in the light of the facts of this case, s. 27 of the Bills of Exchange Act, 1882, does not operate to supply the necessary consideration to support the action on the cheque. The second answer is that the giving of the cheque was induced by a mistake of fact or by the fraud of Davis, or both, and that on that ground the appellant can escape liability. Both grounds were rejected by the learned judge in the court below. So far as the second ground is concerned (and we have not heard Mr. Beney upon it) I confine myself to saying that I see no ground for differing from the view taken by the learned judge that the defence of mistake or fraud will not avail the defendant in this case. The real point in the appeal, which has not been free from difficulty, has been in regard to the first point, the validity of the defence based on want of consideration. I have said that the facts of the case are most remarkable, and I draw attention to these features. At the time when the cheque was taken to the house of the plaintiff the plaintiff was himself absent. The plaintiff's wife was there and appears to have received the envelope containing the cheque but, according to the evidence, no statement or explanation was given to her why the cheque was brought, or indeed, so far as I know, that the envelope contained a cheque. The plaintiff, therefore, was unaware of the benevolence of the second defendant until he returned to Egham on the Friday. The chronology is not entirely clear, but I assume in his favour—and I think perhaps this is right—that he got to Egham, opened the envelope and saw the cheque some little time, a matter of an hour or two, before he saw the second defendant and learned from her why, in the first place, she had sent the cheque, and at the same time of the fact that since she had discovered the truth about Davis she had changed her mind and had stopped, or was about to stop, the cheque.

So far as his own evidence is concerned it is, I think, important to take note of the answers he gave both in chief and in cross-examination. From what I have said it is, of course, quite plain that at the time of the delivery of the cheque to the plaintiff's wife nothing was communicated

C. A.

1949

OLIVER v. DAVIS.

Evershed M.R.

about the second defendant's intention. At the very end of his examination, in answer, first, to a question by Finnemore J.: "Was nothing ever said about this cheque? You found "it in the envelope, was that all you knew about it?" he said: "Nothing at all. The point was I was not in Egham "until that was drawn—until after it was stopped." I think that answer may not be quite accurate in fact because, as I have said, I think he may have got back to Egham before it was stopped, or at any rate he learned of the cheque's existence before he learned it had been stopped. Then Mr. Lawson asked him: "Was the only discussion you had with "Miss Woodcock about the cheque when you went to see her "on August 22?" and he said "Correct." In cross-examination by Mr. Stevenson for the appellant, he was asked this: "(Q) You have told my Lord that you had no communication "with Miss Marjorie Woodcock about her cheque before she "actually gave the cheque to you. (A) To my wife. That is "correct. (Q) So there was no promise by you at all at that "time? (A) What about? (Q) To Miss Woodcock when "she gave you her cheque, that you should refrain from taking "proceedings against Davis. (A) Definitely not." There was no re-examination. The learned judge has found, and there is no reason whatever to quarrel with his finding in any respect, that at the time Miss Marjorie Woodcock drew the cheque she intended that it should serve the purpose of protecting Davis from being sued by Oliver, and perhaps worse. I need not refer to the whole of the relevant passage, but the conclusion was stated thus: "So she"—that is the appellant—"drew the cheque for 400*l.* and gave it to Davis intending "that Davis should take it to the plaintiff and intending that "the plaintiff should pass it through his bank and collect the "money." That no doubt was at the time, August 18 or 19, when the cheque was drawn, Miss Woodcock's intention; but it is quite clear that that intention was not then communicated to Oliver, and when Oliver first heard what Miss Woodcock had been about and what her intention had been he heard at the same time that for very good reasons she had changed her mind and that the cheque was stopped.

Before I turn to the section and one or two cases which have been referred to, I should complete the narrative to this extent. Though both Davis and the appellant were parties to the action, Davis did not appear, and no further proceedings in the action have been taken by Oliver against him.

The evidence of Oliver was that on the advice of his solicitor at a much later stage he did present the cheque of the appellant, which was, of course, returned marked by the bank " Stopped " by order of drawer."

Section 27, sub-s. 1 of the Bills of Exchange Act, 1882, on which the whole argument turns, is in these terms: " Valuable consideration for a bill may be constituted by " (*a*) Any consideration sufficient to support a simple contract; " (*b*) An antecedent debt or liability. Such a debt or liability " is deemed valuable consideration whether the bill is payable " on demand or at a future time." It is pointed out by Mr. Lawson that para. (*b*), referring to an antecedent debt or liability, is on the face of it something distinct in subject-matter from para. (*a*), which refers to considerations sufficient to support a simple contract. I think for myself that the proper construction of the words in (*b*) " An antecedent debt " or liability " is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have been prima facie the result that at common law the giving of a cheque for an amount for which you are already indebted imports no consideration, since the obligation is past and has been already incurred. On the facts of this case it may not be strictly necessary to express a concluded view on that matter. But the case in this court of *Crears* v. *Hunter* (1) (which, though decided after the date of the Act of 1882, related to the law in regard to bills of exchange which the Act generally codified) including the argument addressed to the court on behalf of the defendant, in my judgment strongly supports the view that "an antecedent debt or liability" ought so to be construed. This at any rate is plain—that if the antecedent debt or liability of a third party is to be relied upon as supplying " valuable consideration for a bill," there must at least be some relationship between the receipt of the bill and the antecedent debt or liability. And for practical purposes it is difficult to see how there can be any distinction between a case in which there is a sufficient relationship for this purpose between the bill and the antecedent debt or liability and a case in which, as a result of that relationship, there is in the ordinary sense a consideration passing from the payee to the drawer of the bill. Otherwise the creditor might recover both on the debt from the third party and on the cheque from the drawer. Reference has also been made to the second part of para. (*b*) " Such a debt or liability is deemed valuable " consideration whether the bill is payable on demand or at a " future time." There seems little doubt that that part of the paragraph was inserted to meet a point left in some doubt as the result of *Currie* v. *Misa* (1), in which, with the dissent of the then Chief Justice and without the assent of one of the other judges, the view had been expressed that there was no difference in principle, where a debtor gave a bill or cheque to the creditor, between the case where the bill or cheque was post-dated and when it was payable on demand. *Currie* v. *Misa* (1) was a case where the giver of the bill or cheque was himself the debtor. I do not myself think that that case can be relied on (as was suggested in argument) as casting any doubt on the authority of other decisions, particularly *Crears* v. *Hunter* (2) (which, as I have said, is a decision of this court) to the effect that where the debt or liability is that of a third party you must find something in the transaction sufficient at the very least to connect the receipt of the bill with the antecedent debt or liability and, as I think, to provide some consideration for the cheque in the form of forbearance or a promise to forbear, express or implied, on the part of the recipient of the cheque in regard to the third party's antecedent debt or liability.

---

(1) 19 Q. B. D. 341.

As I have mentioned *Crears* v. *Hunter* (2), I would like to refer to one or two passages in the judgment to which Somervell L.J. referred during the argument. That was a case in which the antecedent debt or liability was that of a third party, namely, the father of the defendant. What had happened was that the defendant's father had borrowed a certain sum of money from the plaintiff and, as stated in the head-note, " For the purpose of inducing the plaintiff to give " time to the defendant's father for payment of a debt, the " defendant signed a promissory note whereby the defendant's " father and the defendant jointly and severally promised to " pay to the plaintiff the amount of the debt with interest " half-yearly at the rate of 5 per cent. per annum until the " amount was paid." Lord Esher M.R., in the course of his judgment, used this language after referring to certain passages in another case (3): " It clearly follows . . . . that, if at " the request of the guarantor the creditor does in fact forbear, " there is a sufficient consideration to bind the guarantor,

(1) L. R. 10 Ex. 153.
(2) 19 Q. B. D. 341.
(3) Ibid. 345.

" who has promised to pay the debt. It was argued that the " request to forbear must be express. But it seems to me " that the question whether the request is express or is to be " inferred from the circumstances is a mere question of evidence. " If a request is to be implied from the circumstances, " it is the same as if there were an express request." Then Lindley L.J. dealing with the facts of the particular case, says: " But, except on the theory that" the plaintiff would give the father time, " was the understanding between the parties, " the defendant's conduct is inexplicable. I cannot think " that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant." Finally, Lopes L.J. said: " The law appears to be that a " promise to forbear is a good consideration, but also that " actual forbearance at the request, express or implied, of the " defendant would be a good consideration. Taking the " latter of these two alternatives, it is undisputed that there " was actual forbearance from suing in this case. That by " itself would not be sufficient; such forbearance must have " been at the request, express or implied, of the defendant."

There is no doubt that in some cases, particularly where the bill or cheque given has been post-dated, the court has, in the absence of express evidence, readily implied a promise, at any rate during the interval before the post-dated bill or cheque becomes payable, not to press the claim against the debtor. A number of cases to that effect were cited in argument by Mr. Beney, starting from the early case of *Popplewell* v. *Wilson* (1), and ending with a recent decision of Hallett J. in *Ayres* v. *Moore* (2). But I think it quite plainly emerges that in each of those cases the plaintiff in the action had in fact forborne or promised, either expressly or impliedly, to forbear from pursuing his claim against the debtor as a consequence of, and, therefore, as consideration for, the giving of the bill which was sued upon; and that the decision in each of those cases depended upon that fact. Particular reliance was placed, not unnaturally, upon the judgment of Parke B. in *Baker* v. *Walker* (3), but I think his judgment when examined is strictly in line with the general conclusion which I have already stated. " Where a man," says the learned judge, " who has a judgment debt takes from his " debtor a promissory note for the amount, payable at a certain

(1) 1 Strange 264.

(2) [1940] 1 K. B. 278.

(3) 14 M. & W. 465.

"time, it must be inferred that he thereby enters into an "agreement to suspend his remedy for that period, and if so, "that is a good consideration for the giving of the note."

I come back to s. 27 of the Act, and the question appears to me to be of this nature. The section does not, as I read it, say that where there is an antecedent debt or liability even on the part of the giver of the chequer that that is, without more, in every case and necessarily valuable consideration for the bill. Certainly in the case with which we are dealing where the antecedent debt or liability is that of a third party the matter is, I think—and I adopt the language of Lord Esher in *Crears* v. *Hunter* (1)—a matter of evidence. What is the evidence in this case? I have already referred to passages from the testimony given by the plaintiff, and I can draw from those passages no other conclusion than that he neither forbore nor promised to forbear, or ever intended or thought of forbearing for an instant in respect of any remedy he had against Davis, and any steps he might think of taking against him. If there were no oral evidence at all and if Oliver had retained the cheque for some time albeit knowing that it had been stopped, and during that time, though Davis's cheque had fallen due for payment, had taken no step, the court might have inferred that he had altered his position on the faith of the defendant's cheque. But the facts which I have already stated cannot support such an inference. On the evidence given by the plaintiff, as I read it, it is, I think, impossible to imply any such promise, just as it is quite clear that no express promise was given, or I think ever would have been given. One passage in the defendant's evidence was relied on, not unnaturally, in which under cross-examination she was asked what steps she had taken after the stopping of the cheque. After being asked this question: "(Q) You "did see Mr. Oliver from time to time after the cheque had "been stopped? (A) Yes," Mr. Lawson went on: "(Q) And "you did tell him, or ask him, to hold his hand, not to do "anything about it for the time being? (A) Yes, because my "sister's money was gone too." That I agree is consistent with the view that the defendant at that time may have thought or feared that the plaintiff might sue on her cheque or Davis's cheque, or both. She was asking the plaintiff to do nothing. But I confess that I find the whole of this part of Miss Woodcock's evidence far from clear. I have said that she acted with a remarkable lack of prudence. I think it is also clear that she had no very great understanding of what her position was. She had stopped the cheque, I gather, on advice, and in this passage, and indeed in the passages which preceded it, she displayed a considerable confusion of mind as to the whole matter. I do not altogether wonder. She had been grossly deceived, as her sister had been, and it is not surprising that she was by this time in a somewhat confused condition about the whole thing. But I cannot find in that passage sufficient evidence to support the view that she had ever said anything to the plaintiff to justify him in thinking that this cheque remained in any sense security for Davis's debt or anything which qualifies the effect of the denial on the plaintiff's part of any promise by him and, as I think, any intention by him, at any stage, to forbear against Davis. Indeed, at the beginning of his argument, Mr. Beney, in answer to a question from me, conceded that there was on this evidence no ground for saying that any promise of forbearance, express or implied, as a consequence of the cheque could be imputed to the plaintiff. Later in the argument Mr. Beney asked the court to draw the inference that the cheque was accepted and held by way of conditional discharge of Davis's debt. I doubt whether the latter contention is consistent with the earlier contention, but I am quite clear that the contention is quite inconsistent with the plaintiff's subsequent conduct.

---

(1) 19 Q. B. D. 341, 345.

I therefore conclude on the whole facts in this case that there is no ground for saying that any consideration for the giving of this cheque can be found, " or constituted," to use the words of the section, " by the antecedent debt or liability," of Davis or otherwise, and in this respect I reach a conclusion differing from that of the learned judge in the court below. The greater part of the learned judge's judgment was directed to the question which we have not found it necessary to deal with (except very briefly) of mistake or fraud as a defence to the action. But after the passage in the judgment to which I have already made reference, and after referring to the section, the learned judge said this: " sub-section (*b*), of course, " differs from the ordinary law of contract and is a special " provision dealing with incidents of this kind. There was an " antecedent debt or liability because Davis owed the plaintiff " on a cheque the sum of 400*l*. He had actually received " a month or so before 350*l*. in hard cash. Miss Woodcock

" knew it ; she says so, and it was because of that, and knowing " the existence of that liability when, in fact, she paid this " cheque to Mr. Oliver. It is true she was actuated by other " motives—very natural ones—she wanted to ensure that " her sister did not lose the furniture and the bungalow and, " although she was deceived by Davis about that, that was " the motive. There was a liability, without any question " at all, and equally without any question, Miss Woodcock " drew this cheque in favour of the plaintiff because of the " antecedent debt or liability of Davis then, apparently, " about to be married to her sister. That being out of the " way and there being a properly drawn cheque, there is on " the evidence before me plain consideration in the existence " of this antecedent debt or liability." With all respect, I cannot agree that that is an exhaustive statement of the case. An antecedent debt or liability of a third party in vacuo cannot form a valuable consideration. Some connexion at the least must be shown between the receipt of the bill and the debt, and though the motives of Miss Woodcock were, as the learned judge stated, there is equally no doubt that they were not communicated at the material time to Oliver. In my judgment there is nothing in this case which can provide a consideration for the cheque by reference to the antecedent debt or liability of Davis, and nothing which would allow the court to infer any forbearance, any change of attitude to his detriment, on the part of Oliver, as a result of this cheque, in regard to Davis and his claim on Davis's cheque.

For these reasons, with all respect to the learned judge, I think that the plaintiff ought not to have obtained judgment against Miss Woodcock on the cheque. I confess I am not sorry to reach that conclusion, for it seems to me that the contrary result would in the circumstances of this case have offended against common sense. I think, therefore, that this appeal should be allowed.

SOMERVELL L.J. In suing on this cheque the plaintiff in his amended statement of claim anticipated a possible defence that there was no consideration for it by pleading in para. 3 : " Further or alternatively the consideration for the " said cheque was the antecedent debt or liability of the first-" named defendant to the plaintiff." He was right because there was a plea that there was no consideration for the cheque. That, therefore, is the first issue which we have to decide.

The question of the effect of an antecedent debt is dealt with in s. 27 of the Bills of Exchange Act, 1882. It is important, I think, to read the two sub-paragraphs together : " Valuable " consideration for a bill may be constituted by (*a*) Any consid- " eration sufficient to support a simple contract ; (*b*) An ante- " cedent debt or liability. Such a debt or liability is deemed " valuable consideration whether the bill is payable on demand " or at a future time." In approaching matters which are at present covered by the Bills of Exchange Act, one must, of course, bear in mind what was laid down by Lord Herschel in respect of this Act in the *Bank of England* v. *Vagliano Brothers* (1), and which has been laid down by other judges in respect of Acts which are by their title codifying Acts. I do not propose to read what Lord Herschel said, but I think this is an accurate summary of it. He said you must look at the Act, you must not start by looking at the old cases. You must look at the Act and construe it, and it is only in certain circumstances that you are entitled to refer to earlier decisions. He gives one example : if a provision be of doubtful import such resort would be perfectly legitimate. It seems to me the first question which arises in this case is, is the antecedent debt or liability referred to in sub-s.(1) (*b*) of s. 27 an antecedent debt due from the person who gave the negotiable instrument in respect of which no other consideration was given ? I am prepared to assume on consideration that, reading s. 27, sub-s. 1 (*a*)and (*b*) together, the natural construction of " antecedent " debt " is that it means a debt due from the person who gives the negotiable instrument in question. Assuming, however, that the words are of doubtful import, there is the decision of this court which has been referred to of *Crears* v. *Hunter* (2), which, though subsequent in date to the Bills of Exchange Act, so far as I can see, though I did not raise this point when the argument was in progress, must have been decided on the law prior to the codification in that Act on the ground that the instrument in question was given in 1877 before the Act came into force. Therefore, I presume the law to be applied would be the law at the time the instrument was given. In the argument in the case no reference is made to s. 27, and the learned judges do not seem to be purporting to construe it. Assuming, however, in Mr. Beney's favour that the words of the Act are of doubtful import, this is a case which we can

(1) [1891] A. C. 107.

(2) 19 Q. B. D. 341.

C. A.

1949

OLIVER
v.
DAVIS.

Somervell L.J.

look at and apply. On that basis, it seems to me to resolve that doubtful import in the sense in which I have indicated, namely, that the antecedent debt or liability in s. 27, sub-s. 1 (*b*) is a debt or liability due from the maker or negotiator of the instrument and not from a third party. That being so, in this case the plaintiff cannot rely on (*b*). He cannot say: "Because there was an antecedent debt or liability from the "third party, therefore I am entitled to succeed." *Crears* v. *Hunter* (1), in my opinion, makes it clear that when dealing with a negotiable instrument given in respect of a debt of a third party, consideration has to be found such as is now referred to in s. 27, sub-s. 1 (*a*), namely, consideration sufficient to support a simple contract. If that is right, the plaintiff has here to show a consideration sufficient to support a simple contract. I do not propose to go into the facts which have been already stated by the Master of the Rolls, but, for the reasons which he has given, I think the plaintiff fails to establish any consideration such as would support a simple contract. He got the cheque. When he came home he found it on Friday, and I will assume did not see the appellant until Saturday. There is no evidence that he forbore. In fact, the evidence is the other way. In my judgment, on the facts there is no evidence that he forbore nor is there evidence of any other consideration which would entitle him to succeed under that part of the section. For these reasons I think this appeal succeeds.

DENNING L.J. I agree. At one time, under the count for indebitatus assumpsit, the common law used habitually to enforce promises for which the only consideration was an antecedent debt or liability of the promisor to the promisee: see Smith's Leading Cases, 13th ed., vol. 1, at pp. 153-4, 635-6. It still does enforce them to some extent as, for instance, in the case of a promise contained in a cheque given for an antecedent debt or liability of the promisor. Section 27, sub-s. 1 (*b*) of the Act gives statutory effect to this rule. But this does not apply to a promise to pay an antecedent debt or liability of a third person. In such a case in order that the promise may be enforced there must be shown a consideration which is sufficient to support a simple contract. This was the view expressed by Byles J. in his book on Bills, and it is also adopted in *Crofts* v. *Beale* (2) and *Crears* v. *Hunter* (1). If

(1) 19 Q. B. D. 341.

(2) 11 C. B. 172.

Ayres v. *Moore* (1) contains anything to the contrary, I cannot agree with it.

Now as to what is sufficient consideration, an express or implied agreement by the creditor to forbear from suing the third person is, of course, good consideration. So also is the simple fact of forbearance by the creditor, even if it only arises ex post facto, providing that the promise to pay was given with the intention of gaining forbearance *Wigan* v. *English and Scottish Life Assurance Association* (2), per Parker J. The enforcement of the promise to pay where there is no promise to forbear, express or implied, but only the fact of forbearance is really the enforcement of a simple unilateral contract. There must be consideration before it will be enforced, but the consideration need not arise at the time of the contract. It is sufficient if it arises ex post facto. The real reason why the promise is enforced is because it was intended to be binding, intended to be acted on, and was in fact acted on. Then once the promise has been acted on, the act done is itself sufficient consideration for the promise. The old common law had no difficulty in enforcing simple unilateral contracts, but it always required that there should be consideration, that in some act done or forbearance shown by the promisee on the faith of the promise, or as it was sometimes put, something done to his detriment, before he could come to the court to enforce it. In my opinion that is the law today. In the present case, as Mr. Beney admitted, the plaintiff in no way changed his position in consequence of the promise. There is no consideration for it. He cannot, therefore, recover. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Ellis and Fairbairn; Sidney C. Elphick.*

(1) [1940] 1 K. B. 276, 282. (2) [1909] 1 Ch. 291, 298, 303.

H. C. G.

Followed. GOLDBERG
v. EDWARDS
[1950] 1 Ch. 247

WRIGHT *v.* MACADAM.

C. A.

1949
July 26, 27.

Tucker, Singleton and Jenkins L.JJ.

Landlord and tenant—Flat—Tenancy by agreement under hand—Tenant permitted by landlord to use coal shed in garden—Right known to the law—Lease—Conveyance of land—Use of coal shed a right enjoyed with the flat—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 62 *and* 205, *sub-s.* 1 (ii).

In November, 1940, the defendant landlord let to the first plaintiff, Mrs. W., for one week, a top floor flat, and after the expiration of that week Mrs. W. remained in occupation by virtue of the Rent Restriction Acts, and with the permission of the defendant used a shed in the garden for the storage of coal. In August, 1943, the defendant granted a new tenancy for one year of the flat, with an additional room, to Mrs. W. and her daughter, the second plaintiff. The document, which was an agreement under hand only, contained no reference to the coal shed, but the plaintiffs continued to enjoy the use of it without charge until 1947, when the defendant asked them to pay an extra 1*s.* 6*d.* per week in respect of the use. The plaintiffs refused to pay the extra amount and being denied the further use of the shed brought the present action, claiming a declaration that their tenancy of the flat included the right to use the coal shed, and damages. The county court judge dismissed the claim, and after the hearing in the county court, the defendant removed the shed. On appeal:—

Held, that the use of the coal shed was a right known to the law which was enjoyed with the flat by permission of the landlord, and passed with the grant of the agreement of August 28, 1943, which, although under hand only, was by virtue of ss. 52, sub-s. 2 (*d*) and 54, sub-s. 2 a lease within the meaning of s. 205 of the Law of Property Act, 1925, and therefore was a "conveyance of land" within the meaning of s. 62 of the Act. The appeal succeeded but in the circumstances the plaintiffs would only be awarded the limited damages claimed.

On the argument that the permission to use the shed was only a personal licence and "precarious" the decisions in *International Tea Stores Co.* v. *Hobbs* [1903] 2 Ch. 165 and *Burrows* v. *Lang* [1901] 2 Ch. 502 explained, and the former applied.

APPEAL from deputy judge, Wandsworth county court.

By a tenancy agreement dated November 2, 1940, the defendant let to Mrs. Wright, for one week certain, two rooms of the top floor of No. 13, Mount Ararat Road, Richmond, with the use of domestic offices. After the expiration of that week, Mrs. Wright remained in occupation by virtue of the Rent Restriction Acts, and early in 1941, the defendant gave her permission to use a shed in the garden for the storage of coal. That state of affairs continued until August 28, 1943, when the defendant granted a new tenancy for one year of the flat, with an additional room, to both Mrs. Wright and her daughter, at an annual rental of 52*l*. The document, which was under hand only, contained no reference to the use of the coal shed, which the Wrights continued to enjoy until October, 1947, without charge. In May of that year the defendant made representations to Mrs. Wright to the effect that an extra 1*s*. 6*d*. a week should be paid for the use of the coal shed. Mrs. Wright was apparently willing to agree, but her daughter strenuously opposed such an arrangement, and their right to use the shed being denied by the defendant the Wrights brought the present action in the Wandsworth county court, claiming an injunction to restrain the defendant from trespassing or otherwise interfering with their lawful use of the coal shed, a declaration that their tenancy of the flat included the right to use the coal shed, and 10*l*. damages. The deputy judge, Sir Norman Edgley, dismissed the action, and the plaintiffs appealed.

Brundrit for plaintiffs. On the undisputed evidence and by the admission of the defendants, the coal shed was an outhouse or erection occupied and enjoyed with the flat and/or the right to use it was a right and advantage enjoyed with the flat. The learned judge was wrong in law in holding that the shed or the right to use it did not pass to the plaintiffs under the lease of August 28, 1943, by virtue of s. 62 and s. 205, sub-s. 1 (ii) of the Law of Property Act, 1925 (1).

Borders for defendant. Although it is admitted that the coal shed was used by the plaintiffs as tenants of the flat, it was not used under any sufficiently definite arrangement, but purely as a matter of personal licence, and precariously. The arrangement under which it was used conferred no right in any way appurtenant to the flat and s. 62 of the Act of 1925 had no application to it.

---

(1) Law of Property Act, 1925, s. 62, sub-s. 1: "A conveyance of "land shall be deemed to include "and shall by virtue of this Act "operate to convey, with the land, "all buildings, erections, fixtures- ". . . . liberties, privileges, ease- "ments, rights and advantages "whatsoever, appertaining or re- "puted to appertain to the land "or any part thereof, or, at the "time of conveyance demised, "occupied, or enjoyed with, or "reputed or known as part or "parcel of or appurtenant to the "land or any part thereof."

Section 205, sub-s. 1 (ii.): "'Conveyance' includes a mort- "gage, charge, lease, assent, vest- "ing declaration . . . . and every "other assurance of property or of "an interest therein."

C. A.

1949

WRIGHT
v.
MACADAM.

TUCKER L.J. I will ask JENKINS L.J. to deliver the first judgment.

JENKINS L.J., stated the facts and continued: The plaintiffs claimed an injunction to restrain the defendant from trespassing or otherwise interfering with their lawful use of the coal shed, a declaration that their tenancy of the flat included the right to use the coal shed, and damages limited to 10*l*. I may mention that, as matters stand at present, the last of those claims appears to be the only relevant one, inasmuch as we were informed in the course of the hearing that the defendant has in fact pulled down the coal shed. The question, therefore, is simply this: whether the plaintiffs, as tenants of the top floor flat at 13, Mount Ararat Road, were entitled to the use of the coal shed in question. It is argued for the plaintiffs that they were so entitled, by virtue of s. 62 of the Law of Property Act, 1925, which is the section replacing the old s. 6 of the Conveyancing and Law of Property Act, 1881, and providing by statute the general words which it was formerly customary to insert in full in the parcels of conveyances and other dispositions of land. The plaintiffs claim that this section covers the case. The defendant, on the other hand, claims that, although the coal shed was admittedly used, it was used under no sufficiently definite arrangement; that it was used purely as a matter of personal licence and precariously; and that the arrangement under which it was used could not be said to confer a right in any way appurtenant to the flat, but was an arrangement of a kind to which s. 62 of the Act had no application. The learned deputy judge decided the question in favour of the defendant, and his reasons are thus stated in a very short note of his judgment: "Plaintiffs' suit dismissed with costs, scale B. (Defendant's "evidence is accepted regarding the initial terms of the tenancy "and the various interviews which took place. The question "raised under s. 62 Law of Property Act decided in favour "of the defendant. The right to use the coal shed was merely "a temporary licence which might be withdrawn at any time "and was in fact withdrawn. The evidence shows that this "was never a right or advantage appurtenant to the flat, "which on a previous occasion had actually been let without "this advantage)."

It is now necessary to refer to s. 62 of the Law of Property Act, 1925. The sub-sections bearing on this point are sub-ss. 1 and 2. Sub-section 1 relates to "a conveyance of "land." Sub-section 2 relates to "a conveyance of land, "having houses or other buildings thereon." I should say at once that, by virtue of the definition contained in s. 205, sub-s. 1, sub-para. (ii), "conveyance" includes a mortgage, charge, lease, assent, vesting declaration, and so on, and every other assurance of property or of an interest therein. It follows that the document of August 28, 1943, if it is a lease within the meaning of that definition, is a "conveyance" for the purposes of s. 62. It will be remembered that the letting was for a term of one year only. I think it follows from s. 52, sub-s. 2 (*d*) of the Law of Property Act, 1925, read in conjunction with sub-s. 2 of s. 54, that this document, though expressed as an agreement, and though under hand only, is a "lease" within the meaning of the definition. It will be remembered that s. 52 provides by sub-s. 1: "All "conveyances of land or of any interest therein are void for "the purpose of conveying or creating a legal estate unless "made by deed." Sub-section 2 provides: "This section "does not apply to" (*d*): "leases or tenancies or other "assurances not required by law to be made in writing." Then s. 54 lays down in sub-s. 1 the general rule that interests in land created by parol shall have the force and effect of interests at will only, but sub-s. 2, provides: "Nothing in "the foregoing provisions of this Part of this Act shall affect "the creation by parol of leases taking effect in possession "for a term not exceeding three years (whether or not the "lessee is given power to extend the term) at the best rent "which can be reasonably obtained without taking a fine." So that the document here in question was adequate for the purpose of passing to Mrs. and Miss Wright the legal estate in the property for the term contemplated, and since the expiration of that term they have been holding over on the same terms. Accordingly, s. 62 applies, inasmuch as the transaction under consideration is a "conveyance" within the meaning of the section. It is, moreover, a conveyance of land, although it comprises only the upper floor of a house, inasmuch as the definition of "land" in s. 205, sub-s. 1, sub-para. (ix) provides that "land" includes, amongst other things, "buildings or parts of buildings."

This is, therefore, a conveyance of land within the meaning of s. 62, sub-s. 1; and I think that is the appropriate sub-section rather than sub-s. 2, which deals with a conveyance of land "having houses or other buildings thereon." The relevant parts of both sub-sections are, however, for all purposes material to this case, the same.

The question in the present case, therefore, is whether the right to use the coal shed was at the date of the letting of August 28, 1943, a liberty, privilege, easement, right or advantage appertaining or reputed to appertain, to the land, or any part thereof, or, at the time of the conveyance, demised, occupied or enjoyed with the land—that is the flat—or any part thereof. It is enough for the plaintiffs' purposes if they can bring the right claimed within the widest part of the sub-section—that is to say, if they can show that the right was at the time of the material letting demised, occupied or enjoyed with the flat or any part thereof.

The predecessor of s. 62 of the Act of 1925, in the shape of s. 6 of the Act of 1881 has been the subject of a good deal of judicial discussion, and I think the effect of the cases can be thus summarized. First, the section is not confined to rights which, as a matter of law, were so annexed or appurtenant to the property conveyed at the time of the conveyance as to make them actual legally enforceable rights. Thus, on the severance of a piece of land in common ownership, the quasi easements de facto enjoyed in respect of it by one part of the land over another will pass although, of course, as a matter of law, no man can have a right appendant or appurtenant to one part of his property exerciseable by him over the other part of his property. Secondly, the right, in order to pass, need not be one to which the owner or occupier for the time being of the land has had what may be described as a permanent title. A right enjoyed merely by permission is enough. The leading authority for that proposition is the case of *International Tea Stores Co.* v. *Hobbs* (1). That was a decision of Sir George Farwell as a judge of first instance. It was a case in which the defendant, who owned two houses, let one of them for business purposes and there had been a practice of giving permission to the successive managers of the property let to pass and re-pass with their servants and so forth across a yard which was part of the property and remained in the defendant's occupation. The part of the property which had been let was later sold to the tenants, nothing being said in the conveyance about the right of way. The purchasers claimed to exercise the right of way

---

(1) [1903] 2 Ch. 165.

C. A.
1949
WRIGHT
v.
MACADAM.
Jenkins L.J.

by virtue of s. 6 of the Act of 1881. That claim was disputed, and the point was taken that it could not be a right which would pass under the implied general words inasmuch as it was only precariously enjoyed. The learned judge held that the fact that the way was permissive only was irrelevant for this purpose, and that by virtue of s. 6 of the Act of 1881 the grant included a corresponding right of way in fee simple. Dealing with the question of licence or permission, the learned judge said this: "Unless I am prepared to say that in "no case can a tenant obtain under the Conveyancing Act, "1881, a right of way unless he has enjoyed it as of right, "I must hold in this case that the fact of licence makes no "difference. In all these cases the right of way must be "either licensed or unlicensed. If it is unlicensed it would "be at least as cogent an argument to say, 'True you went "'there, but it was precarious, because I could have sent "'a man to stop you or stopped you myself any day.' If it "is by licence, it is precarious, of course, in the sense that the "licence, being ex hypothesi revocable, might be revoked "at any time; but if there be degrees of precariousness, "the latter is less precarious than the former. But, in my "opinion, precariousness has nothing to do with this sort of "case, where a privilege which is by its nature known to the "law—namely, a right of way—has been in fact enjoyed. "Lord Coleridge's argument was founded upon a misconception "of a judgment of mine in *Burrows* v. *Lang* (1), where I was "using the argument of precariousness to show that the right "which was desired to be enjoyed there was one which was "unknown to the law—namely, to take water if and whenever "the defendant chose to put water into a particular pond; "such a right does not exist at law; but a right of way is "well known to the law" (2).

That case has been followed or cited with approval in subsequent cases, in particular in *Lewis* v. *Meredith* (3), where Neville J. referred to it, saying: "I come to the conclusion "that at the date of the grant the water was being, and had "for a long time been, used for the tan pit and the mason's "yard. Easement or right in the strict sense there could "not be, for the common ownership precluded the acquisition "of any right or easement by the occupiers, but *International*

---

(1) [1901] 2 Ch. 502.
(2) [1903] 2 Ch. 171.
(3) [1913] 1 Ch. 571.

C. A.
1949

WRIGHT
v.
MACADAM.

Jenkins L.J.

"*Tea Stores Company* v. *Hobbs* (1) shows that 'a right' permissive at the date of the grant may become a legal right "upon the grant by the force of the general words in s. 6 of the "Conveyancing Act, 1881. From this point of view the "circumstances under which the quasi right was enjoyed "become immaterial so long as it was actually enjoyed and "was of a nature which could be granted, that is to say, a "right known to the law: see *Burrows* v. *Lang*" (2).

Again in *White* v. *Williams* (3), Younger L.J. (as he then was) cited with apparent approval *International Tea Stores Co.* v. *Hobbs* (1). The relevant passage in his judgment, is this: "I doubt whether we can enter upon this question "in view of the finding of the county court judge; but even "if no more than an intermittent and temporary user had "been exercised, the right would nevertheless in my opinion "be included within these words in s. 6, because it is a right "known to the law and, that being so, it matters not, so far "as s. 6 of the Conveyancing Act is concerned, whether the "user is continuous and permanent or permissive and precarious: *International Tea Stores Co.* v. *Hobbs* (1)."

There is, therefore, ample authority for the proposition that a right in fact enjoyed with property will pass on a conveyance of the property by virtue of the grant to be read into it under s. 62, even although down to the date of the conveyance the right was exercised by permission only, and therefore was in that sense precarious.

The next proposition deducible from the cases is the one laid down in *Burrows* v. *Lang* (2), which has been referred to in some of the passages I have already read. It is that the right in question must be a right known to the law. In *Burrows* v. *Lang* (2) it was held that a so-called right to take, for the purposes of watering cattle, so much water, if any, as might happen to be left in an artificial watercourse after the owner of the watercourse had taken what he required for his own purposes, was not such a right. A certain amount of confusion has been introduced into the discussion on this aspect of the case by the circumstance that some of the learned judges have used the word "precarious" in describing rights of a kind unknown to the law, and in particular the expression was so used by Farwell J. in the case of *Burrows* v. *Lang* (2); but in this context the precariousness enters into the character of the right as distinct from the title to the right. The right is precarious in the sense that, to take the example of the surplus water, there may be no water at all, and that the right is in itself liable to be defeated in that way. It is necessary to keep clearly in mind the distinction between "precariousness" in the sense in which it is used in relation to quasi rights of that description, and precariousness of title as used in relation to a permissively exercised right. For the purposes of s. 62, it is only necessary that the right should be one capable of being granted at law, or, in other words, a right known to the law. If it is a right of that description it matters not, as the *International Tea Stores* (1) case shows, that it has been in fact enjoyed by permission only. The reason for that is clear, for, on the assumption that the right is included or imported into the parcels of the conveyance by virtue of s. 62, the grant under the conveyance supplies what one may call the defect in title, and substitutes a new title based on the grant.

---

(1) [1903] 2 Ch. 165.
(2) [1901] 2 Ch. 502.
(3) [1922] 1 K. B. 727, 740.

There is one other point to be mentioned. A further exception has been recognized in cases in which there could in the circumstances of the case have been no expectation that the enjoyment of the right could be other than temporary. That exception was recognized by Cotton L.J. in *Birmingham & Dudley District Banking Company* v. *Ross* (2). The learned Lord Justice was dealing with a situation of this kind. There had been a building scheme under which an area of land was to be developed and built up. Somebody took a lease of one of the houses at a time when an adjoining plot only had built upon it old buildings of less height than those contemplated by the scheme; but it was well known to everybody that the intention was, and the building scheme demanded, that this plot should be built upon to a greater height. The question for the court was whether the lessor of the houses would be committing a derogation from grant in building on the adjoining plot inasmuch as the effect of that would be to obscure to some extent the light enjoyed by the lessee of the building already erected next door. It was held in those circumstances, as one might expect, that there was no derogation from grant and there was no such enjoyment of the light over the vacant plot as would bring s. 6 of the Act of 1881 into operation. The learned Lord Justice said this: "Therefore, I think it "could not be said that the light coming over that low building

---

(1) [1903] 2 Ch. 165.
(2) (1889) 38 Ch. D. 295, 307.

C.A.
1949
WRIGHT
v.
MACADAM.
Jenkins L.J.

"to these windows could be considered as enjoyed with it "within the meaning of this section. The light did in fact "at the time come over that building; but it came over it "under such circumstances as to show that there could be no "expectation of its continuance. It had not been enjoyed "in fact for any long period; and in my opinion it was enjoyed "under such circumstances, known to both parties, as could "not make it light enjoyed within the meaning of that section." The learned Lord Justice, I think, meant no more than this, that it was knowledge common to both parties that the existing low building was going to be replaced by a higher one and, that being so, the fortuitous access of extra light to the lessee's building while the scheme was being carried to completion could not be regarded as an enjoyment of light which would pass to the lessee a right to have it continued in the same degree.

I think those are all the cases to which I can usefully refer, and applying the principles deducible from them to the present case one finds, I think, this. First of all, on the evidence the coal shed was used by Mrs. Wright by the permission of Mr. Macadam, but *International Tea Stores Co.* v. *Hobbs* (1) shows that that does not prevent s. 62 from applying, ✓ because permissive as the right may have been it was in fact enjoyed.

Next, the right was, as I understand it, a right to use the coal shed in question for the purpose of storing such coal as might be required for the domestic purposes of the flat. In my judgment that is a right or easement which the law will clearly recognize, and it is a right or easement of a kind which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels. This, therefore, is not a case in which a title to a right unknown to the law is claimed by virtue of s. 62. Nor is it a case in which it can be said to have been in the contemplation of the parties that the ✓ enjoyment of the right should be purely temporary. No limit was set as to the time during which the coal shed could continue to be used. Mr. Macadam simply gave his permission; that permission was acted on; and the use of the coalshed in fact went on down to August 28, 1943, and thereafter down to 1947. Therefore, applying to the facts of the present case the principles which seem to be deducible from the authorities, the conclusion to which I have come is that the right to use the coal shed was at the date of the letting of August 28, 1943, a right enjoyed with the top floor flat within the meaning of s. 62 of the Law of Property Act, 1925, with the result that (as no contrary intention was expressed in the document) the right in question must be regarded as having passed by virtue of that letting, just as it would have passed if it had been mentioned in express terms in cl. 1, which sets out the subject-matter of the lease.

---

(1) [1903] 2 Ch. 165.

Mr. Borders for the defendant sought to rely on the fact that there was no precise evidence as to the mode in which the right was to be enjoyed. The particular point he took was that there was no evidence as to the means of access by which the tenants were to go to and from the coal shed when they had occasion to put coal in or take coal out. In my judgment that has no effect on the conclusion. Mr. Macadam admitted in his evidence that he gave permission for the coal shed to be used, and he admitted that it was still being used in fact on August 28, 1943. In my judgment the right must be regarded as carrying with it the necessary means of access, and it must be assumed that at all times down to August 28, 1943, Mrs. Wright enjoyed the use of the coal shed together with the necessary access to it and from it.

Finally, there is the question of the 1*s*. 6*d*. per week. Mr. Borders suggested that there was evidence on which the court could hold that there was in 1947 a new agreement superseding any right which may previously have existed, under which the ladies were to be entitled to use the coal shed for a payment of 1*s*. 6*d*. a week, In my judgment that contention cannot prevail, for two reasons. First of all, the evidence is that the only agreement as to the payment of 1*s*. 6*d*. a week was made with Mrs. Wright and not with Miss Wright, and that Miss Wright, when apprised of it, expressed her dissent in no uncertain terms. It has not been shown to my satisfaction that Mrs. Wright was the agent of Miss Wright for this purpose. That would in itself be sufficient to dispose of this point. But, secondly, it seems to me that, on the footing that by virtue of s. 62, Mrs. and Miss Wright became entitled on August 28, 1943, to use the coal shed, then the alleged agreement to pay 1*s*. 6*d*. a week would, even if otherwise free from objection, be an agreement to make a payment with no consideration to support it. Mr. Borders also invited us to collect from the evidence indications that there was some consideration in the form of allowing the shed to be kept locked and so forth, but, in my judgment, there is no sufficiently clear evidence to show that there was really any such consideration.

For these reasons I am of opinion that the learned judge came to a wrong conclusion when he held that s. 62 of the Law of Property Act had no application. He said that the right to use the coal shed was merely a temporary right. That, as I have said, is no sufficient ground for excluding the operation of s. 62, having regard to the principle laid down in *International Tea Stores Co.* v. *Hobbs* (1). Further, he said that this was never a right or advantage appurtenant to the flat. But it is not only rights or advantages that are appurtenant to given premises that pass under s. 62. It is enough, as I have already said, that the right or advantage should in fact be enjoyed with the premises. Accordingly, it seems to me that the learned judge was wrong in excluding the operation of s. 62. It is plain, however, that he did not have the assistance of nearly so full an argument as has been presented to us in this court and, that being so, it is not surprising that in this rather difficult case he came to a conclusion different from mine.

For these reasons I would allow the appeal and direct that, inasmuch as the coal shed is now no longer in existence, judgment should be entered for the plaintiffs for the sum of damages claimed.

TUCKER L.J. I have no doubt that when the parties entered into the agreement of August 28, 1943, which is quite a full one, setting out ten sub-clauses showing the tenant's liability, they thought they were satisfactorily putting down their rights in black and white, and regulating their position; but they were unaware, I have no doubt, of s. 62 of the Law of Property Act, 1925, and the result is that, having got at loggerheads with each other, they have embarked upon litigation in the County Court and now find themselves in the Court of Appeal, where the case has taken a day to hear and no less than twelve authorities have been cited in order to enable us to elucidate this problem.

During the argument I had felt some difficulty in reconciling the two cases of *International Tea Stores Co.* v. *Hobbs* (1) and *Burrows* v. *Lang* (2), but I find myself in complete agreement with the analysis of the cases which has been made by Jenkins L.J. and of the principles to be extracted from them, and as to the meaning of the word "precarious" in those

(1) [1903] 2 Ch. 165. (2) [1901] 2 Ch. 502.

two cases. The result is that the defendant, through his act of kindness in allowing this lady to use the coal shed, is probably now a wiser man, and I may perhaps regret that the decision in this case may tend to discourage landlords from acts of kindness to their tenants. But there it is: that is the law.

In this particular case we are told that the landlord, since the hearing before the county court judge, has in fact taken down the shed. I do not think it would be right in a case of this kind—rather a trivial sort of quarrel—to make a mandatory injunction compelling him to restore this shed. If he had in fact taken down the shed before the hearing in the county court, the position might have been very different; but he succeeded in the county court and he took down the shed. It is quite true that he did it at his peril, but I think that in the circumstances of this case justice will be done by awarding the plaintiffs the sum of 10*l.* by way of damages.

SINGLETON L.J. I agree.

Appeal allowed.

Solicitor for plaintiffs: *H. N. H. Bransom.*
Solicitors for defendant: *Dale & Newbery, Feltham.*

A. W. G.

ELCOCK AND OTHERS v. THOMSON.

1949
May 18, 19, 23, 24; *July* 1.
Morris J.

Insurance—Fire—Valued policy—Mansion damaged by fire—Not reinstated—Measure of indemnity—Principles of marine insurance law—Applicability—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 27, *sub-s.* 3; *s.* 69, *sub-s.* 3; *s.* 71, *sub-s.* 3.

A mansion was insured against fire, and by a schedule to the policy its value was agreed at 100,000*l.* (or 106,850*l.*, including certain offices and adjoining buildings). The mansion was damaged by fire. Its actual value before the fire was 18,000*l.*, and its actual value after the fire was 12,600*l.* (the depreciation in value being 5,400*l.* in 18,000*l.*). The cost of reinstatement would have been some 40,000*l.*, but the mansion was not in fact reinstated:—

Held, that in order to assess the amount to which the assured were entitled under the policy the percentage of actual depreciation resulting from the fire should be applied to the agreed value, and that the assured were therefore entitled to

$$\frac{5,400}{18,000} \times 106,850l., \text{ or } 32,055l.$$

Quaere (i.) whether, had reinstatement been in fact effected, underwriters would have been liable to pay the cost of it; or (ii.) whether, had the cost of reinstatement been less than 32,055*l*., but it had not in fact been effected, underwriters could limit their liability to the cost of reinstatement.

ACTION.

By a Lloyd's fire policy dated November 22, 1940, property specified in a schedule attached to the policy was insured against "loss or damage" by fire or lightning. Item (1.) of the schedule was a mansion at Easthampstead Park, Wokingham, and against it, in a column headed "sum insured," was set the figure 100,000*l*. Items (2.) to (5.) included various offices and adjoining buildings, and against those items (in the columns headed "sum insured") were set various figures totalling 6,850*l*. At the end of the schedule it was provided: "The sum set opposite each item in this specification has been "accepted by the underwriters and the assured as being "the true value of the property insured and in the event "of a loss the said property will be assumed to be of such "value and will be assessed accordingly."

On May 16, 1947, during the currency of the insurance, the mansion was damaged by fire. The assured claimed against the underwriters in respect of that damage. The underwriters agreed that the assured were entitled to recover, but the amount to which they were entitled was disputed. The mansion was not reinstated.

The present action was a representative action brought against one of the underwriters.

Scott Cairns K.C. and *Mendel* for the assured. The principle of indemnity does not apply strictly to valued policies: the agreed valuation must not be ignored: *Lewis* v. *Rucker* (1); *Irving* v. *Manning* (2); *North of England Iron Steamship Insurance Association* v. *Armstrong* (3); Marine Insurance Act,

(1) (1761) 2 Burr. 1167.
(2) (1847) 1 H. L. C. 287.
(3) (1870) L. R. 5 Q. B. 244.

1906, s. 27, sub-s. 3 (1). *City Taylors, Ld.* v. *Evans* (2) is the only reported case regarding a valued policy of fire insurance. That decision shows that the agreed valuation must be accepted in fire insurance as well as in marine insurance.

The actual value of the mansion in the present case must be taken to be the agreed valuation, viz., 100,000*l.* The loss to the assured must be taken to be the difference between that amount and the value of the mansion after the fire, and the assured are entitled to recover that difference. There is no analogy to the present case in marine insurance law. In *Lewis* v. *Rucker* (3) a verdict of a jury was taken as to the rule which ought to be applied in assessing damage to cargo under a valued policy. The correct approach in the present case is to construe the actual words of the contract of insurance unhampered by any previous decisions.

Alternatively the reasoning of Lord Mansfield C.J. in *Lewis* v. *Rucker* (3) is applicable to the present case, and the measure of indemnity stipulated by s. 71, sub-s. 3, of the Marine Insurance Act for damage to cargo insured by a valued

---

(1) The Marine Insurance Act, 1906, s. 27, sub-s. 1: "A policy "may be either valued or un-"valued." Sub-s. 2: "A valued "policy is a policy which specifies "the agreed value of the subject-"matter insured." Sub-s. 3: "Subject to the provisions of this "Act, and in the absence of fraud, "the value fixed by the policy is, "as between the insurer and "assured, conclusive of the in-"surable value of the subject "intended to be insured, whether "the loss be total or partial."

Section 69: "Where a ship is "damaged, but is not totally "lost, the measure of indemnity, "subject to any express pro-"vision in the policy, is as "follows:—

". . . . (3.) Where the ship "has not been repaired, and has "not been sold in her damaged "state during the risk, the assured "is entitled to be indemnified for "the reasonable depreciation aris-"ing from the unrepaired damage, "but not exceeding the reasonable "cost of repairing such dam-"age . . . ."

Section 71: "Where there is a "partial loss of goods, mer-"chandise, or other moveables, "the measure of indemnity, sub-"ject to any express provision in "the policy, is as follows:— ". . . . (3.) Where the whole or "any part of the goods or mer-"chandise insured has been de-"livered damaged at its destina-"tion, the measure of indemnity "is such proportion of the sum "fixed by the policy in the case of "a valued policy, or of the in-"surable value in the case of an "unvalued policy, as the differ-"ence between the gross sound "and damaged values at the place "of arrival bears to the gross "sound value."

(2) (1921) 38 T. L. R. 230.

(3) 2 Burr. 1167.

1949

ELCOCK
v.
THOMSON.

policy ought to be applied. The analogy of a building to goods is closer than the analogy of a building to a ship. Even, however, if the analogy to a ship be chosen, s. 69, sub-s. 3, of the Marine Insurance Act must be construed as being limited by s. 27, sub-s. 3. That sub-section provides that the agreed valuation must be taken to be conclusive "whether "the loss be total or partial." [*Steamship* "*Balmoral*" *Co., Ld.* v. *Marten* (1) and *Pitman* v. *Universal Marine Insurance Co.* (2) were then referred to.] Whichever analogy is chosen, therefore, the agreed valuation must not be ignored, and, if marine principles are to be applied at all, the percentage of actual depreciation resulting from the fire in the present case must be applied to the agreed value.

If neither of those methods of calculating the measure of indemnity are applicable the assured is entitled to the cost of reinstatement.

Havers K.C. and *Gahan* for the underwriters. The agreed valuation should be ignored in the present case. It only applies in the case of a total loss. The assured are therefore entitled to the difference between the actual value of the mansion before the fire and its value after the fire.

The principles of marine insurance law are applicable to the present case: *Castellain* v. *Preston* (3); *City Taylors Ld.* v. *Evans* (4). The analogy applicable is that of a ship. A building is more like a ship than goods. Like a ship it is usually capable of being repaired. The measure of indemnity laid down by s. 69, sub-s. 3, of the Marine Insurance Act, 1906, must therefore be applied. No distinction is drawn in that sub-section, such as the distinction in s. 71, sub-s. 3, between valued and unvalued policies. It must therefore have been the intention of the legislature for s. 69, sub-s. 3, to apply in the case of a valued policy. Section 27, sub-s. 3, begins: "Subject to the provisions of this Act," and it is clearly subject, therefore, to s. 69, sub-s. 3.

Alternatively, if the agreed value must be taken into consideration, the correct percentage to apply to the agreed value is the proportion which the cost of reinstatement bears to the cost of building a new mansion.

Scott Cairns K.C. replied.

Cur. adv. vult.

(1) [1902] A. C. 511.
(2) (1882) 9 Q. B. D. 192.
(3) (1883) 11 Q. B. D. 380.
(4) 38 T. L. R. 230.

July 1. MORRIS J. In order to adjudicate upon the present claim it is necessary to determine what is the sum appropriate to be paid under a valued policy of insurance in respect of damage to a mansion caused by fire.

The cubic content of the whole mansion was 990,260 cubic feet. The cubic content of the portion of the mansion which was burnt out was 209,000 cubic feet, representing just over 21 per cent. of the whole. But I am satisfied that the measure of the depreciation in value of the mansion which was caused by the fire cannot properly be determined by having regard merely to the proportion to the whole structure of the part which was burnt out.

If reinstatement of the damage at a date a few months after the fire had been possible the cost of such reinstatement would have been 40,252*l.*, excluding architects' and surveyors' fees, or 43,252*l.*, including such fees. If a new mansion had been erected at about such date similar to the mansion in question as it stood before the fire, the cost of erection would have been 205,000*l.*

(His Lordship then considered the evidence as to the actual value of the mansion before and after the fire, and continued :) The result is that in my judgment the actual value of the mansion before the fire was 18,000*l.* and its value after the fire was 12,600*l.*

Mr. Scott Cairns presented alternative formulations of claim on behalf of the assured. He submitted (i) that the assured were entitled to recover the difference between the amount of 100,000*l.* and whatever amount was found by the court to represent the value of the mansion after the fire. Alternatively he submitted (ii) that the actual value of the mansion before the fire should be assessed and also the actual value after the fire, and that the percentage of depreciation should then be applied to the agreed or conventional value of 100,000*l.* so as to produce a resulting figure which would be the amount recoverable. As a further possible alternative method of claiming he submitted (iii) that the assured were entitled to recover a sum representing the cost of reinstatement of the mansion. Mr. Scott Cairns did not, however, put that basis forward very strongly.

On behalf of the underwriter, Mr. Havers' main submission was that the principles which would apply if there were a claim under a valued policy of marine insurance on a ship which was damaged were the principles which could and should be applied in adjudicating upon the present claim. He submitted that the interpretation of s. 69, sub-s. 3, of the Marine Insurance Act, 1906, was that, if a ship covered by a valued policy was damaged but not lost, and if it was not repaired, recovery under the policy should be limited to a sum representing the actual depreciation in value caused by the casualty.

As an alternative submission he contended that recovery should be limited to that percentage of the agreed value of 100,000*l.* as the cost of reinstatement about the date of the fire bore to the cost of the construction of a new mansion at that date. Thus he contended that the cost of reinstatement 40,252*l.*, represented 19·635 per cent. of 205,000*l.*, the cost at about the date of the fire of the construction of a new mansion similar to the one which existed, and that the sum to be awarded should therefore be limited to 19·635 per cent. of 100,000*l.*

Mr. Scott Cairns submitted that there was no reason for preferring the analogy of the rules governing a policy on a ship to that of the rules relating to goods, and he referred to the reasoning in *Lewis* v. *Rucker* (1). Alternatively he submitted that if, contrary to his contention, s. 69, sub-s. 3, of the Marine Insurance Act could be regarded as directing the way to the principle applicable in the present case, that sub-section ought not to be regarded without reference also to s. 27, sub-s. 3.

I pass now to consider what is the basis upon which the claim should be allowed.

When parties have agreed upon a valuation then, in the absence of fraud or of circumstances invalidating their agreement, they have made an arrangement by which for better or for worse they are bound. As Atkin L.J. pointed out in *City Taylors, Ld.* v. *Evans* (2): "In a valued policy, "what is valued is the subject-matter of the insurance, and "not the amount of the loss." He pointed out that in marine insurance the position is made clear by the Marine Insurance Act, 1906, s. 27, sub-ss. 2 and 3. It was common ground between the parties that the policy in the present case was properly to be regarded as a valued policy. When losses occur after parties to contracts of insurance have agreed upon values then in some cases advantage may occur to the insured while in others advantage may occur to the insurer. (See *North of*

(1) 2 Burr. 1167.

(2) 38 T. L. R. 230, 234.

England Iron Steamship Insurance Association v. *Armstrong* (1).)

In *Irving* v. *Manning* (2) the assistance of the judges was sought by the House of Lords, and Patteson J., delivering the opinion of the judges, said in reference to a valued policy on a ship (3): "By the terms of it, the ship, etc., for so much "*as concerns the assured, by agreement* between the assured "and assurers, are and shall be rated and valued at 17,500*l.*, "and the question turns upon the meaning of these words. "Do they, as contended for by the plaintiff in error, amount "to an agreement that for all purposes connected with this "voyage, at least for the purpose of ascertaining whether "there is a total loss or not, the ship should be taken to be "of that value, so that when a question arises whether it "would be worth while to repair, it must be assumed that "the vessel would be worth that sum when repaired? Or "do they mean only, that for the purpose of ascertaining the "amount of compensation to be paid to the assured, when "the loss has happened, the value shall be taken to be the sum "fixed, in order to avoid disputes as to the quantum of the "assured's interest? We are all of opinion that the latter "is the true meaning; and this is consistent with the language "of the policy and with every case that has been decided upon "valued policies."

Patteson J. said further (4): "A policy of insurance is "not a perfect contract of indemnity. It must be taken "with this qualification, that the parties may agree beforehand "in estimating the value of the subject assured, by way of "liquidated damages, as indeed they may in any other contract "to indemnify."

Mr. Havers did not dispute that if the mansion had been entirely destroyed by fire the agreed valuation would have become the measure of the indemnity to be paid by underwriters. But he argued that as the mansion was only damaged the agreed valuation should not enter into the assessment of the amount payable by underwriters. His argument was in the main based upon a contention that under s. 69, sub-s. 3, of the Marine Insurance Act the amount payable under a policy of marine insurance where a ship was damaged and had not been repaired, nor sold in her damaged state, would be the amount of the depreciation. He submitted that, as there is no express mention of valued policies in s. 69, sub-s. 3, the result should follow that, in the case of a partial loss of a ship, payment under a policy of insurance should be made without regard to any agreed valuation. He submitted that a fire policy being a contract of indemnity closely resembling a marine policy should be similarly construed, and he relied upon passages in the judgment in *Castellain* v. *Preston* (1) in support of his contention that the two types of policy should be similarly regarded.

---

(1) L. R. 5 Q. B. 244.
(2) 1 H. L. C. 287.
(3) Ibid. 305.
(4) Ibid. 307.

In considering these contentions, as Mr. Scott Cairns pointed out, it is first to be observed that the statutory provisions of the Marine Insurance Act, 1906, do not apply to the present case. But, if those provisions are to be looked at in order to seek guidance on principle, I am not prepared to accept the validity of Mr. Havers' contentions. Section 69, sub-s. 3, of the Act uses the words "is entitled to be indemnified "for the reasonable depreciation." Those words do not fix the measure of such indemnity. They do not lay it down that the parties' agreed valuation is to be ignored. They certainly do not provide that s. 27, sub-s. 3, of the Act is to be disregarded. Indemnification for reasonable depreciation must in my judgment take into account any agreed valuation. Such agreed valuation is the corpus out of which depreciation takes place and by reference to which the depreciation must be measured. Furthermore, in my judgment, there is nothing in s. 69, sub-s. 3, which is inconsistent with or which overrides what was laid down in *Pitman* v. *Universal Marine Insurance Co.* (2) and *Steamship "Balmoral" Co., Ld.* v. *Marten* (3). In *Pitman* v. *Universal Marine Insurance Co.* (2), the view of Lindley J., and of the majority in the Court of Appeal, was that if the owner of a ship which is injured by perils insured against does not repair the ship but sells her during the continuance of the risk, he can recover from underwriters for the depreciation in value of the ship, and can arrive at the measure of the underwriters' liability by applying the proportion of depreciation caused by the casualty to the value as agreed in the policy. Lord Lindley said in *Steamship "Balmoral" Co., Ld.* v. *Marten* (4): "The notion prevalent at one time, and supported by the "high authority of Mr. Benecke, that although the valuation "in a policy is conclusive in the case of a total loss, yet that "in the case of a partial loss the valuation may be opened,

---

(1) 11 Q. B. D. 380.

(2) 9 Q. B. D. 192.

(3) [1902] A. C. 511.

(4) Ibid. 521, 522.

"has long been exploded. . . . . There are numerous decisions "shewing this to be the case in valued policies on goods and "freight (the most recent being *The Main* (1), and I am unable "to discover any reason for applying to ships a doctrine "repudiated as unsound when applied to goods or freight. "At the same time, I have not discovered any direct decision "on this point. The principle that a valuation in a policy "on ships is to be regarded in cases of partial loss was assumed "to be correct in *Pitman* v. *Universal Marine Insurance Co.* (2) "and was not questioned on appeal. The owners, however, "contend that the underwriters have no concern with the "mode in which the amounts payable for losses insured against "are arrived at. The owners say they are fully insured up "to a certain limit, and that if that limit is not exceeded "all losses insured against must be fully paid. This, my "Lords, appears to me to ignore the difference between valued "policies, as understood in this country, and open policies, "and to be erroneous according to English law."

There appears to be no decided case which affords conclusive authority in regard to the issues raised in the present action. Some guidance in principle can however be derived from the decisions in cases where insured ships have sustained partial loss. In my judgment, on the facts of the present case, the assured are entitled to be indemnified in respect of the depreciation which was caused by the fire, and in quantifying such depreciation the insurable value of the mansion as agreed by the parties cannot be set aside and disregarded.

I observe that by the words at the end of the schedule to the policy by which such agreement as to value is expressed it is stipulated that "in the event of loss" the property "will be assumed to be" of the value recorded and "will be "assessed accordingly." In the body of the policy the words used are "to insure from loss or damage." I have considered whether any significance is to be attached to the fact of the use of the word "loss" only at the end of the schedule, and whether it could be argued that the agreement as to value was only to apply in the event of the destruction or loss of an item as opposed to damage occurring to it. No such point was however taken or argued, and I cannot imagine that any significance attaches to the use only of the word "loss." It would be strange and unnatural if an agreed value were

(1) [1894] P. 320.

(2) 9 Q.B.D. 192.

only to apply in the event of complete destruction and not in the event of partial destruction. The respective words "loss" and "damage" as used in the policy seem to be synonymous. It would not seem to be the case that the word "loss" is only referable to complete destruction. Apart from this however the opening words of the provision, namely the words, "The sum set opposite each item in this specification "has been accepted by the underwriters and the assured "as being the true value of the property insured," appear to contain agreement as to value irrespective of the meaning of the word "loss" which is later used.

Although in the case of item (I.) in the schedule to the insurance policy, namely the mansion, the actual value is shown to have been far less than the agreed value, it must have been the case that the agreed value of other items were far below their actual values in 1947. Thus, without specifying any particular item, a house whose agreed valuation was 2,000*l.* may very well in 1947 have actually been worth 6,000*l.* If such a house had been totally destroyed underwriters would only have been liable to pay 2,000*l.* If damage by fire had resulted in a depreciation in actual value from 6,000*l.* to 2,000*l.*, and if actual repairs were not effected, underwriters would, I imagine, have contended that they were only liable to pay two-thirds of 2,000*l.*, whereas on Mr. Havers' contention they would have been liable to pay more. If repairs were actually done, and done in a reasonable way, and at a reasonable cost, it may be that the underwriters would be liable to pay the cost of them up to the extent of their liability under the policy. Further it may be that if repairs were not done, but could be done at a figure representing less than underwriters' liability on the basis of depreciation, underwriters could limit their liability to the lower figure. Thus if the agreed valuation of a house were 2,000*l.*, and its actual value were 1,000*l.*, and if it were so damaged that its actual value became 500*l.*, but it could be repaired for 500*l.*, it may be that the underwriters' liability would have been 500*l.* As the questions which I have posed do not call for present determination, I express no final opinion in regard to them, but I have considered it desirable to have them in mind when examining and testing the submissions made to me. It may well be that if 43,252*l.* had in fact been expended in repairing the damage done, underwriters would have been liable to pay that amount. It is not, however, necessary to express any concluded view in regard to that question.

1949

ELCOCK
v.
THOMSON.

Morris J.

The result is that, in my judgment, the percentage of actual depreciation resulting from the fire should be applied to the agreed values as set out in the policy so as to arrive at the amount recoverable. On my findings the mansion was worth 18,000*l.* before the fire and 12,600*l.* after the fire. There was, therefore, a depreciation of 5,400*l.* in 18,000*l.*, or a depreciation of 3 in 10. By the mansion I mean the entirety described in items (1.) to (5.) of the schedule which together had an agreed value of 106,850*l.* The loss or damage which occurred to the assured was therefore three-tenths of that figure, namely, 32,055*l.*, and the defendant is liable for his proportion of that sum. There will be judgment accordingly.

Judgment accordingly.

Solicitors for assured: *Upton, Britton and Lumb.*
Solicitors for underwriters: *Chamberlain & Co.*

R. P. C.

GALLAGHER *v.* SHILCOCK

1949
Mar. 17, 25.

Finnemore J.

Sale of goods—Rights of unpaid seller—Contract for sale of motor-boat—Deposit by buyer—Buyer's default in completion—Re-sale by seller—Whether operative as rescission of contract—Buyer's right to return of deposit—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 39, 48.

By s. 48, sub-s. 3, of the Sale of Goods Act, 1893: " . . . . where "the unpaid seller gives notice to the buyer of his intention to "re-sell, and the buyer does not within a reasonable time "pay . . . . the price, the unpaid seller may re-sell the goods" and claim damages.

By sub-s. 4: "Where the seller expressly reserves a right "of re-sale in case the buyer should make default, and on the "buyer making default, re-sells the goods, the original contract "of sale is thereby rescinded . . . ."

Having regard to the express provision for rescission in s. 48, sub-s. 4, of the Act of 1893, where the right of re-sale has been reserved in the contract of sale, the true construction of sub-s. 3 is that, where an unpaid seller, in the absence of such a reservation, exercises his right of re-sale under sub-s. 3, that exercise does not operate to rescind the contract, for the seller, in so acting, is affirming the contract and ensuring that he receives the contract price. Accordingly, the contract not being rescinded, he must, on exercising his power of re-sale under s. 48, sub-s. 3, repay to the original purchaser his deposit or bring the amount of it into account in any claim which he makes against that purchaser for damages resulting from loss on the re-sale.

Howe v. *Smith* (1884) 27 Ch. D. 89, applied.

ACTION.

On May 17, 1947, the plaintiff made an agreement in writing with the agent of the defendant to buy for 665*l.* a motor boat belonging to the latter, and paid the agent 200*l.*, described in the agreement as a "deposit." The sale was "subject to "survey" to be carried out at the buyer's expense, but there was no provision in the contract enabling the seller to re-sell on the buyer's making default. By May 29 the buyer had received a satisfactory surveyor's report. On May 31 the buyer told the seller that he was not in a position on that day to pay the balance of the purchase price because he had had to help another person who was in a difficulty, but that he proposed to raise the money by a mortgage of the ship, which would have, for that purpose, to be registered. At the same time the buyer signed a document which recited that the survey of the ship had proved satisfactory and that he accepted the vessel. It was not disputed that the property in her thereupon passed to the purchaser. It was agreed that the agent would have the ship registered, and that the buyer would thereupon pay the balance of the purchase price after obtaining a mortgage. Finnemore J. found as a fact that that was merely an agreement for postponing payment of the purchase price and not a new contract of which the obtaining of a mortgage or registration of the ship was a condition.

Difficulties occurred in regard to registration of the ship, and for some weeks the buyer was left in ignorance of what was happening except that on June 18 he sent 2*l.* for the survey fee at the request of the seller's agent. On July 13, 1947, a son of the seller telephoned to the buyer that he must pay the balance of the purchase price at once or the "deposit" would be forfeited; and on July 16 the seller's solicitors wrote to the buyer that the ship would be sold to someone else and the "deposit" forfeited if the balance were not paid by July 31. That letter was only received some days later because the buyer had changed his address. The buyer's solicitors sent a reply on July 30, and on August 14 the buyer himself wrote to the seller. On August 22 he visited the seller and stated that he was then ready to complete the purchase, but the seller informed him that the vessel had been sold for 700*l.* on August 7.

The buyer accordingly brought this action, claiming specific performance of the contract, alternatively damages for breach of contract, or, in the further alternative, the return of the 200*l.* He made no claim either by the original statement of claim or by amendment thereof for recovery of the difference between the amount realized by the second sale and the contract price.

Finnemore J. decided against the buyer on his claim for specific performance and damages for breach of contract, holding that the seller had lawfully exercised his right of re-sale under sub-s. 3 of s. 48 of the Sale of Goods Act, 1893. The seller claimed to retain the 200*l.* on the ground that the re-sale constituted a lawful rescission of the contract by him and that the 200*l.*, being a deposit, was therefore forfeited. The case is reported on this point alone.

C. G. Armstrong Cowan for the buyer. The seller's right to retain the deposit of 200*l.* depends on the effect of his exercising his right of re-sale. That right arises under s. 48, sub-s. 3, of the Sale of Goods Act, 1893. The sub-section says nothing about rescission resulting from exercise of the right which it gives. That provision would have been made for rescission if it had been intended to result would seem to be quite clear on a comparison of sub-s. 3 with sub-s. 4. The latter applies where in the contract of sale the seller has expressly reserved a right to re-sale, and it provides that, on a re-sale by the seller under the sub-section, "the original contract "is thereby rescinded." Here, in the absence of such a reservation, the seller is exercising the rights of an unpaid seller; and he is exercising them in order to make sure of receiving the contract price. That is an affirmation not a rescission of the contract. In the absence of any rescission, the seller re-sells as an unpaid seller or pledgee of the goods, and not as their absolute owner. He must, therefore, bring the deposit into account, or, as in this case, where he has suffered no damage in the result, repay it. [*Howe* v. *Smith* (1), Benjamin on Sale, 7th ed., p. 864, and Blackburn on Sale, 3rd ed., p. 495 referred to.]

---

(1) (1884) 27 Ch. D. 89.

1949

GALLAGHER
v.
SHILCOCK.

Geoffrey Howard for the seller. The purchaser, having been given notice of the seller's intention to re-sell if the purchase price were not paid, had a reasonable time within which to comply. He failed to do so. In those circumstances the seller's exercise of his right of re-sale operated to rescind the contract, and he is accordingly entitled to keep the deposit in addition to the price realized on the re-sale. In *Howe* v. *Smith* (1) there was an express reservation to the vendor of power to re-sell in the event of default by the purchaser. A re-sale under that power was no rescission of the contract, as Fry L.J. pointed out (2). It was an affirmation of the contract. The seller was, however, held to have re-sold in exercise of his alternative remedy of rescinding the contract and selling under his absolute title. In the present case there is no express reservation in the contract of a right to the seller to re-sell. The former alternative, existing in *Howe* v. *Smith* (1), is therefore not open to the seller, and it is the second remedy which he has exercised. That operated to rescind the contract, and he is accordingly entitled to keep the deposit.

Cowan replied.

Cur. adv. vult.

March 25. FINNEMORE J. [after stating the facts and disposing of the claims for specific performance and damages]: The first question is whether the 200*l.* which the plaintiff buyer paid on May 17 was a deposit or merely a pre-payment of part of the purchase price. When money is paid in advance, it may be a deposit strictly so called, that is something which binds the contract and guarantees its performance; or it may be a part payment—merely money pre-paid on account of the purchase price; or, again, it may be both: in the latter case, as was said by Lord Macnaghten in *Soper* v. *Arnold* (3): "The deposit serves two purposes—if the purchase is carried out "it goes against the purchase-money—but its primary purpose "is this, it is a guarantee that the purchaser means business." If it is a deposit, or both a deposit and pre-payment, and the contract is rescinded, it is not returnable to the person who pre-paid it if the rescission was due to his default. If, on the other hand, it is part-payment only, and not a deposit in the strict sense at all, then it is recoverable even if the person who paid it is himself in default. That, I think, follows from *Howe* v. *Smith* (1), and from *Mayson* v. *Clouet* (4), a case in

(1) 27 Ch. D. 89.
(2) Ibid. 104, 105.
(3) (1889) 14 App. Cas. 429, 435.
(4) [1924] A. C. 980.

the Privy Council. As I understand the position, in each case the question is whether the payment was in fact intended by the parties to be a deposit in the strict sense or no more than a part payment : and, in deciding this question, regard may be had to the circumstances of the case, to the actual words of the contract, and to the evidence of what was said. There is little or no evidence here about that, because the question was not very much canvassed. True, when, on August 22, the purchaser was told that the vessel had been sold, he asked for his deposit back and was told by the vendor that he was not entitled to it. Later, however, the vendor said that he would repay it. The agent said that he assumed that when the boat had been sold to someone else the deposit would be repaid to the plaintiff. That, however, may have been no more than an expression of the agent's opinion of what, apart from the legal rights of the matter, was the fair and proper thing to do.

The only real evidence which I have is the document of May 17. In that document the 200*l.* is described as a deposit, and, that being the only indication, I think that those who use that word must be taken to know what it means and to intend it to bear that meaning. Bowen L.J. in *Howe* v. *Smith* (1) said : " Without going at length into the history, " or accepting all that has been said or will be said by the " other members of the court on that point, it comes shortly " to this, that a deposit, if nothing more is said about it, is, " according to the ordinary interpretation of business men, " a security for the completion of the purchase." I therefore think that I am bound to hold that this 200*l.* paid by the purchaser was a deposit in the strict sense of the term, although, no doubt, if the purchase had been completed, it would have gone against the purchase price. In short, it was both a deposit and a pre-payment of part of the price. It still, however, remains to decide whether, although it was a deposit, the defendant is entitled to treat it as forfeited, and to retain it.

It is agreed by both counsel—and this is a fact of crucial importance—that on May 31 the property in the vessel passed to the purchaser. From that moment she was the property of the purchaser, subject of course to certain rights which the seller, as an unpaid seller, has at law. Had it been burnt out the next day, the loss would have been the purchaser's

(1) 27 Ch. D. 98.

had it for some reason increased in value, which was indeed alleged at one time, that increase would have been to the purchaser's benefit. He was entitled at any moment after May 31, on tendering the balance of the purchase price, to require the seller to hand over the vessel. He did not, however, tender the money until August 22, and I have come to the conclusion that he was then in default in payment. A reasonable time had elapsed after the seller's notice of July 16 for the due performance of this contract, during which he ought to have been ready with this money, and had elapsed on August 7, on which date the seller, as I find rightly, had re-sold the vessel in pursuance of his rights under sub-s. 3 of s. 48 of the Sale of Goods Act.

The question therefore arises whether in these circumstances the deposit is forfeited or not. It is a question of considerable difficulty and I am not sure that it has ever yet been directly decided. The answer to it depends on the construction of certain sections of the Sale of Goods Act, 1893. Mere failure to pay on the appointed day—mere delay over payment of the purchase price—does not rescind a contract, unless, of course, the parties have otherwise agreed. Time is not of the essence of the contract unless it is expressly made so. In Benjamin on Sale (7th ed. p. 864), the editor, commenting on s. 49, sub-s. 1, of the Sale of Goods Act, 1893, states: "Whenever the property has passed and the goods have "reached the actual possession of the buyer, the seller's sole "remedy is by personal action. He stands in the position of "any other creditor to whom the buyer may owe a debt; "all special remedies in his favour qua seller are gone. By "the law of England, in this respect agreeing with the civil "law, mere delay by the buyer in paying the price will not "justify the rescission of the contract by the seller, unless the "right to rescind be expressly reserved." The leading case on the subject is *Martindale* v. *Smith* (1) in which Lord Denman C.J. said (2): "Having taken time to consider our "judgment, owing to the doubt excited by a most ingenious "argument, whether the vendor had not a right to treat the "sale as at an end and reinvest the property in himself by "reason of the vendee's failure to pay the price at the "appointed time, we are clearly of opinion that he had no such "right, and that the action [trover] is well brought against "him. For the sale of a specific chattel on credit, though that

(1) (1841) 1 Q.B. 389. (2) Ibid. 395.

"credit may be limited to a definite period, transfers the "property in the goods to the vendee, giving the vendor a right "of action for the price, and a lien upon the goods, if they "remain in his possession, till that price be paid. But that "default of payment does not rescind the contract . . . . "In a sale of chattels, time is not of the essence of the contract, "unless it is made so by express agreement . . . . ."

After May 31, I think, the seller had two courses open to him: first, to sue for the price under s. 49, sub-s. 1, which provides: "Where, under a contract of sale, the property "in the goods has passed to the buyer," (as it had here) "and "the buyer wrongfully neglects or refuses to pay for the goods "according to the terms of the contract, the seller may "maintain an action against him for the price of the goods."

It seems to me beyond argument that if the seller here had taken that course he could not possibly have sued for the full contract price—665*l.*—and at the same time have kept the 200*l.* without giving credit for it. If a seller takes proceedings under that sub-section and the principle which it enshrines, he is not rescinding the contract, he is taking steps to have the contract price paid to him. Quite clearly, therefore, if the 200*l.* was in part payment of the purchase price as well as being a deposit, and here, beyond any possibility of doubt, it was both, he must bring that into account in giving credit for it.

The seller has a second alternative remedy, if the goods have not reached the purchaser: he may retain the goods and so exercise the unpaid seller's lien and in certain circumstances re-sell. He chose in this case to re-sell. It would be curious that, if he decided to sue the purchaser for the contract price, he should be limited to that price, but that if he kept the goods and sold them he should be entitled not only to the full contract price but also to keep in his pocket any deposit which had been paid beforehand. I think that that must depend ultimately on whether, if the unpaid seller sells against the original purchaser, the contract has been rescinded and the goods have been re-vested in him, or whether the true view is that he is pursuing the remedy given to him by the Act in order to be no longer an unpaid, but a paid, seller. The special rights of an unpaid seller are laid down in s. 39, sub-s. 1, of the Sale of Goods Act. That section enacts that, although the property has passed to the buyer, the unpaid seller, as I have found the seller here to be, has certain rights. He has "(*a*) a "lien on the goods or right to retain them," as he did in this case, and " (*c*) a right of re-sale as limited by this Act." It is important to remember that the only right to re-sell which the unpaid seller has is that which is given to him by s. 39, sub-s. 1, of the Act. Section 48, sub-s. 1, provides: " Subject to the " provisions of this section, a contract of sale is not rescinded " by the mere exercise by an unpaid seller of his right of lien " or retention or stoppage in transitu." It is sub-s. 3 which is operative in this case: " Where the goods are of a perishable " nature, or where the unpaid seller gives notice to the buyer " of his intention to re-sell, and the buyer does not within " a reasonable time pay or tender the price, the unpaid seller " may re-sell the goods and recover from the original buyer " damages for any loss occasioned by his breach of contract." By sub-s. 4: " Where the seller expressly reserves a right of " re-sale in case the buyer should make default, and on the " buyer making default, re-sells the goods, the original contract " of sale is thereby rescinded, but without prejudice to any " claim the seller may have for damages."

I think it plain that the Act draws a distinction between the person who re-sells under sub-s. 3 and the person re-selling who in the contract has expressly reserved a right to re-sell. Sub-section 4 says in terms that in the second case the contract is rescinded. There are no such words in sub-s. 3. I think that the only possible inference from the wording of the Act is that under s. 48, sub-s. 3, the contract is not rescinded. Had it been otherwise, nothing would have been simpler than to make sub-s. 3 read as follows: " Where the goods " are of a perishable nature or where the unpaid seller gives " notice to the buyer of his intention to re-sell and the buyer " does not within a reasonable time pay or tender the price, " the contract of sale is thereby rescinded." The sub-section does not say that: it provides that the unpaid seller may re-sell the goods, and that if that sale does not reimburse him he may still recover damages for any loss which he has suffered. It is really in essence a way in which the seller makes sure of getting his contract price.

The general principle of English law is that mere lateness or unpunctuality in making payment for the goods does not rescind the contract. It would be a curious thing if, nevertheless, the exercise by the seller of his remedy for delay should rescind the contract. The question, therefore, is whether, when the unpaid seller sells the goods, he sells them as a person who, by rescission of the contract, has the full title to the goods re-vested in him, or sells them in a capacity analogous to that of pledgee, or in some limited capacity? So far as I know, this question has never been decided.

In Halsbury's Laws of England, 1st ed., vol. 25, § 461, p. 264, there is this statement: "Whether the unpaid seller under the "foregoing provision [s. 48, sub-s. 3] re-sells the goods in "the capacity of an owner so as to be entitled to any profit "which may be realized by the re-sale, or whether he re-sells "the goods in a capacity analogous to that of a pledgee . . . . "is doubtful." The following words appear for the first time in the corresponding passage in the second edition (vol. 29, § 250, p. 186): "But *semble*, the former is the correct "view."

As I have indicated, I have come to the other view: I do not think that the unpaid seller sells as absolute owner. The property here had already passed. The lateness of payment did not rescind the contract, and therefore did not affect the passing of the property. I do not think that the remedy given by s. 48, sub-s. 3, rescinds the contract any more than do the original defaults of the purchaser. I think that this view is supported by contrasting sub-ss. 3 and 4, where a clear distinction is drawn between the contract which contains an express reservation of the right to re-sell and the one which does not.

It has often been debated whether the Sale of Goods Act, 1893, made new law or only declared the existing common law. In the main it codified and clarified the common law, and so it may be helpful to look at the position existing before the Act was passed. I am fortified in the view which I take by the remarks of Lord Blackburn in Blackburn on Sale, 3rd ed., p. 495. The words are the original ones of Lord Blackburn himself, where he is discussing the lien which the seller has, and the rights which follow from it: "Assuming, therefore, what "seems pretty well established, that the seller's rights exceed "a lien and are greater than can be attributed to the assent "of the buyer under the contract of sale, the question arises "how much greater than a lien are they? It is clear that "in no case do they amount to a complete resumption of the "right of property, or in other words to rescind the contract "of sale, but perhaps come nearer to the rights of a pawnee "with a power of sale than to any other common law "right." The power of re-sale which is given to the seller who has exercised his lien or right of retention is, I think, properly described in that way. There is no rescission of the contract; there is, therefore, no complete resumption of the right of property on the part of the seller, and when he re-sells he does not do so as the full and untrammelled owner. If that view be right it follows that he must then bring into account the 200*l.* which he has already received. The 200*l.* was paid under the contract which had not been repudiated by the purchaser, although he failed to make his payment by the due date. Nothing which happened rescinded the contract. What happened was that the seller enforced his remedy to obtain the contract price by the right of re-sale given to him under the Sale of Goods Act, 1893.

In those circumstances, the deposit must be brought into account, and all that the seller is entitled to receive is a total of 665*l.*, the agreed contract price, subject to the right given to him expressly by the Act to recover any damages which he may in fact have suffered by the purchaser's breach of contract.

That conclusion is fortified by the observations of Fry L.J. in *Howe* v. *Smith* (1). It will be remembered that in that case 500*l.* was paid as deposit and in part payment of purchase money. The contract provided that the purchase must be completed on a certain day, and there was also a clause providing that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. In other words, that contract gave an express right of re-sale to the seller quite apart from what the legal position might be about deposit. Towards the end of his judgment Fry L.J. said (1): "Yet another point has been raised and demands "decision. The eighth clause of the agreement gives, as I "have already stated, a power to the vendor to re-sell if the "purchaser fails in his performance, and declares that the "deficiency on such second sale shall be made good by "the defaulting purchaser and be recoverable as liquidated "damages. In the present case the defendant, the vendor, "declined to perform the contract on the ground of delay "on the part of the plaintiff, the plaintiff brought this action, "and about six months subsequently the vendor re-sold "the property at the original price; and it is contended "by the plaintiff that the defendant thereby lost all right "of retaining the deposit. If the vendor had chosen to

---

(1) 27 Ch. D. 89, 104.

"re-sell under this power and to sue the purchaser for the "deficiency, he would, in my opinion, and in accordance with "the case of *Ockenden* v. *Henly* (1), have been obliged to bring "the deposit into account; but that is not the course which "he has pursued . . . . In my opinion there has been such "default as justifies the vendor in treating the contract as "rescinded; it offers the vendor an alternative remedy, "so that he may either affirm the contract and sell under "this clause or rescind the contract and sell under his "absolute title. If he act under the clause, he must bring "the deposit into account in his claim for the deficiency: "if he sell as owner, he may retain the deposit, but loses "his claim for the deficiency under the clause in question." That case concerned a sale of land and the special contract there made.

I think that under s. 48, sub-s. 3, of the Sale of Goods Act the seller who re-sells, and so ensures his receiving the contract price and any damages which he may have suffered, is affirming and not rescinding the contract, and accordingly must bring the deposit into account.

The result is that the purchaser is entitled to recover the sum of 200*l.*, and that on the counterclaim, on whatever ground it is put, the vendor is not entitled to keep the deposit.

Judgment for the plaintiff.

Solicitors for the plaintiff buyer: *J. A. Ramsey & Co.*

Solicitors for the defendant seller: *Gordon Gardiner, Carpenter & Co., for Cousins and Burbidge, Southsea.*

R. C. C.

---

(1) (1858) E. B. & E. 485.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1949.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1949, will be as follows:—

In the First Series,
[1949] Ch.
In the Second Series,
[1949] 1 K. B. [1949] 2 K. B. [1949] P.
In the Third Series,
[1949] A. C.

INDEX

ACQUISITION OF LAND. *See* LOCAL GOVERNMENT.

AGRICULTURE — *Minimum wage — Workman employed in agriculture—Premises let to him by his employer, not under the terms of his employment—Rent above that prescribed for a cottage, being a benefit or advantage received under the terms of the employment— Agricultural Wages (Regulation) Act,* 1924 (14 *&* 14 *Geo.* 5, *c.* 37), *s.* 1, *sub-ss.* 1 *and* 2, *s.* 7, *sub-ss.* 1, 2, 3, 9, 10 *and* 11, *s.* 8, *sub-s.* 1—*Agricultural Wages* (*Regulation*) *Amendment Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 17), *s.* 1—*Agricultural Wages* (*Regulation*) *Act,* 1947 (10 *&* 11 *Geo.*6, *c.* 15), *s.* 2, *sub-s.* 1.
LONG EATON CO-OPERATIVE SOCIETY, LD. *v.* SMITH - - - - - **C. A. 144**

ARBITRATION. *See* BREACH OF CONTRACT.

BILL OF EXCHANGE — *Cheque — Cheque stopped— Action by payee against drawer—Defence of want of consideration— Alleged payment in respect of past debt of third party—Bills of Exchange Act,* 1882 (45 *&* 46 *Vict., c.* 61), *s.* 27, *sub-s.* 1 (*b*).
OLIVER *v.* DAVIS - - **C. A. 727**

CANADA — *Seamen — Refusal of Canadian shipowners to recognise seamen's union—Strike of crew—Refusal to obey orders—Discharge of crew by master without sanction of proper authority of port—Sanction not obtainable—Refusal of crew to leave ship—Refusal of stevedores to discharge cargo—Ship held up in British port— Action by shipowners for damages for trespass, etc.—Interlocutory mandatory injunction to restrain trespass granted by High Court—Canada Shipping Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 44), *ss.* 2, 284, *sub-ss.* 1 *and* 3, *and* 573.
CANADIAN PACIFIC RAILWAY *v.* GAUD **C. A. 239**

CHARTER PARTY. *See* SHIP.

CHEQUE. *See* BILL OF EXCHANGE.

COMPANY — Indictment of. *See* CRIMINAL LAW.

CONTRACT — *Building contract — Construction—Estimate of works at cost of* 5,000,000*l. by date of completion—Payment at cost plus maximum net profit of* 300,000*l.—Extras ordered under contract at cost of additional* 2,000,000*l.—Protest made by contractors — Completion thereby delayed for a year—Claim for additional net profit, on quantum meruit.*
PARKINSON (SIR LINDSAY) & CO., LD. *v.* COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS - **C. A. 632**

2. —— *Contract subject to trade rules — Defence of force majeure.*
Arbitration — Breach of contract — Arbitrator's award—Powers of arbitrators to allow interest on awards—Civil Procedure Act 1833 (3 *&* 4 *Wm.* 4, *c.* 42), *ss.* 28 *and* 29), *Arbitration Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 14), *s.* 11, *Law Reform* (*Miscellaneous Provisions, Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3.
In re AN ARBITRATION BETWEEN THE PODAR TRADING CO., LD., BOMBAY, AND FRANCOIS TAGHER, BARCELONA **Divl. Ct. 277**

3. —— *Hire-purchase agreement — Motor-car—Defect in title of letter-vendor—Purchaser during currency of the agreement notified of claim of true owner—Total failure of consideration—Right of hirer-purchaser to recover all payments made both before and after notification of claim of true owner—Claim by letter-vendor for rent of use of car while in possession of the hirer-purchaser—Not maintainable.*
WARMAN *v.* SOUTHERN COUNTIES CAR FINANCE CORPORATION, LD. W. J. AMERIS CAR SALES (THIRD PARTY) **Finnemore J. 576**

CONTRIBUTORY NEGLIGENCE. *See* HUSBAND AND WIFE.

CONTROL OF BUILDING. *See* EMERGENCY LEGISLATION.

COSTS. *See* CRIMINAL LAW.

COUNTY COURT — *Practice — Claim for more than 20l. — Reduction below 20l. by payment — Payment made before service of particulars of claim — Action dismissed — Appeal without leave of court — Preliminary objection — County Courts Act*, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 105.

Sale of goods — Implied condition of seller's right to sell — Warranty for quiet possession — Sale of stolen typewriter — Buyer spends money on overhaul — Typewriter returned to true owner — Liability of seller — Measure of damages — Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *ss.* 12, 53, *sub-ss.* 1, 2.
Mason *v.* Burningham - **C. A. 545**

CRIMINAL LAW — *Charge against incorporated company — Indictable offence — Purported verbal committal for trial by magistrate — Subsequent written order by magistrate empowering prosecutor to prefer bill at Assizes — Bill signed by clerk of assize before order drawn up — Indictment bad — Criminal Justice Act*, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 33 — *Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 1.
Rex. *v.* H. Sherman, Ld. **C. C. A. 674**

2. —— *Gaming and wagering — Betting in a public house — Bookmaker's acceptance of bets without the knowledge of the licensee — Betting Act*, 1853 (16 & 17 *Vict.*, *c.* 119), *s.* 3.
Costs — Liability of appellant whose appeal is dismissed — Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 5.
Rex *v.* Porter - - **C. C. A. 128**

3. —— *Horse racing — Obtaining money by false pretences — False statement as to identity and capacity — Payment on horse winning — Repetition of false statement — Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 32, *sub-s.* 1.
Rex *v.* Clucas - - **C. C. A. 226**

4. —— *Procedure — Felony — Fine — Imprisonment — Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 13; *s.* 14, *sub-ss.* 1, 2; *s.* 15, *sub-s.* 5 (*b*).
Rex *v.* Brook - - - **C. C. A. 138**

5. —— *"Suspected person" — Evidence — Proof of previous conviction — Admissibility — Firearms Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2 — *Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.
Rex *v.* Fairbairn - - **C. C. A. 690**

6. —— *Trial — Irregularity in proceedings — Retirement of jury to consider verdict — Permission given to jury to go out to lunch — Verdict of guilty subsequently returned — Proceedings contrary to law — Conviction quashed — Venire de novo — Only to be awarded when trial a nullity from outset — Right of Crown to proceed on cases taken into account when sentence passed.*
Rex *v.* Neal - - - **C. C. A. 590**

CUSTOMS AND EXCISE — *Vessel and tackle used in importation of uncustomed goods — Forfeiture of vessel and tackle — Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36), *ss.* 169, 170, 172, 179 *and* 202 — *Customs General Order*, 1895 (*S. R & O.* 66 1895).
Attorney-General *v.* Hunter
Morris J. 111

2. —— *See* Revenue.

DAMAGES. *See* Sale of Goods.

EDUCATION. *See* Local Government.

EMERGENCY LEGISLATION — *Building — Control — Licence for specified work within a permitted figure — If work exceeded beyond permitted figure, free allowance cannot be added to justify amount of work done — Free allowance only permitted for severable work — Defence Regulations*, 1930, *No.* 56A — *Control of Building Operations (No.* 8) *Order*, 1947 (*S. R. & O.* 1947, *No.* 74).
J. Dennis & Co., Ld. *v.* Munn
C. A. 327

2. —— *Dwelling-house requisitioned in* 1941 — *For homeless from enemy bombing — Occupied by such persons, as licensees — House purchased in* 1947 — *Licensees subsequently leave house — New owner enters house when still requisitioned — Trespasser in his own house — Defence (General) Regulations*, 1939, *reg.* 51 — *Ministry of Health Circular No.* 141 *of* 1946.
Erith Corporation *v.* Holder **C. A. 46**

ESTOPPEL. *See* Landlord and Tenant.

FACTORY — *Dangerous machinery — Duty to fence securely — Whether machine dangerous a question of degree and fact — Fact of accident occurring not conclusive — Factories Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1.
Carr *v.* Mercantile Produce Co., Ld.
Divl. Ct. 601

GAMING. *See* Criminal Law.

HIGHWAY. *See* Metropolitan Water Board.

HIRE-PURCHASE. *See* Contract.

HUSBAND AND WIFE — *Housekeeping money used for stake in football pools — Joint efforts in forecasting — Wife partially responsible for success in forecasting — Winnings placed in account one which both spouses had power to draw — Part of proceeds devoted to purchase of furniture — Separation of spouses — Claim by wife to furniture.*
Hoddinott *v.* Hoddinott **C. A. 406**

2. —— *Husband suing in respect of injuries caused to wife — Contributory negligence of the wife — No effect on husband's claim — Husband's cause of action distinct from that of wife — Law Reform (Contributory Negligence) Act*, 1945 (8 & 9 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 1.
Mallett and Another *v.* Dunn
Hilbery J. 180

INSURANCE — *Fire — Valued policy — Mansion damaged by fire — Not reinstated — Measure of indemnity — Principles of marine insurance law — Applicability — Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 27, *sub-s.* 3; *s.* 69, *sub-s.* 3; *s.* 71, *sub-s.* 3.
ELCOCK *v.* THOMSON - **Morris J. 755**

2. —— MOTOR. *See* ROAD TRAFFIC.

INTERPRETATION OF STATUTE. *See* LANDLORD AND TENANT.

JUDGMENT DEBT — *Judgment summons — Order for committal unless debt paid by instalment — Departure from usual practice — Absence of evidence of means—Debtors Act,* 1869 (32 & 33 *Vict., c.* 62), *s.* 5.
BAREFOOT *v.* CLARKE **C. A. 98**

LAND DRAINAGE — *River — Flooding — Agreement under seal by drainage board with landowner to widen, deepen and make good the banks of river and maintain completed work for all time—Contribution by landowner to cost of work—New banks unable to stand strain of greater inflow of water—Bursting of bank—Serious flooding and damage to crops—Duty of board—Liability of board to covenantee's successor in title and persons holding title under him—Covenant running with the land—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 78, *sub-s.* 1—*Land Drainage Act,* 1930 (20 & 21 *Geo.* 5, *c.* 44), *ss.* 6, 34.
SMITH AND SNIPES HALL FARM, LD. *v.* RIVER DOUGLAS CATCHMENT BOARD **C. A. 500**

2. —— *See* WATER.

LANDLORD AND TENANT — *Estoppel — Death of tenant intestate — No grant of administration—Benefit of tenancy vested in President of Probate, Divorce and Admiralty Division—Landlords purport to grant widow of deceased tenant a tenancy of premises—Death of widow intestate—Grant of administration to her daughter—Daughter continues in possession of premises and pays rent—Plaintiff, successor in title to original lessor, serves notice to quit on President and sues the daughter for possession—Plaintiff estopped by virtue of predecessors' grant of contractual tenancy to widow—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).
MACKLEY *v.* NUTTING - - **C. A. 55**

2. —— *Flat — Tenancy by agreement under hand—Tenant permitted by landlord to use coal shed in garden—Right known to the law—Lease—Conveyance of land—Use of coal shed a right enjoyed with the flat—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 62 *and* 295, *sub-s.* 1 (ii).
WRIGHT *v.* MACADAM **C. A. 744**

LANDLORD AND TENANT—*continued.*

3. —— *Ground floor and basement tenancy in each case—Separate tenancy in each case of first floor rooms—Claim for possession of ground floor and basement—First floor rooms used in the one case for bedrooms and in the other for kitchen and living room—Whether ground floor and basement a dwelling within Rent Restriction Acts—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1929 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.
WIMBUSH *v.* CIBUILA AND ANOTHER. WIMBUSH *v.* LEVINSKI - - **C. A. 564**

4. —— *Interpretation of statute — Rent restrictions—"Was let to him in consequence "of that employment"—Rule of construction—Words or phrase in statute the subject of judicial interpretation—Repeal and re-enactment of words or phrase—Assumption that Parliament knows of and enacts the judicial interpretation—True view and limit of the rule —Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*g*).
THE ROYAL CROWN DERBY PORCELAIN CO., LD. *v.* RAYMOND RUSSELL **C. A. 417**

5. —— *Lease—Trade carried on on controlled premises—Application for new lease in place of compensation for goodwill—Term and rent to be fixed by tribunal under the Landlord and Tenant Act,* 1927—*Claim for standard rent under Rent Restriction Acts—Landlord and Tenant Act,* 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 5, *sub-ss.* 1 *and* 2.
ROSE *v.* HURST - - **C. A. 372**

6. —— *Personal injuries sustained by tenant's daughter—Negligence — Domestic boiler installed by landlord in kitchen—No safety valve fitted to boiler—Explosion of boiler during severe weather—Water pipes frozen up—Fire lit by daughter of tenant—Whether boiler a "noxious and dangerous thing."*
BALL AND ANOTHER *v.* LONDON COUNTY COUNCIL - - - - **C. A. 159**

7. —— *Premises used as solicitors' office—In addition the trade or business of agents for insurance companies and building societies carried on—lessees carrying on a "profession" —No separate goodwill proved in respect of trade or business—Not entitled to compensation or new lease—Landlord and Tenant Act,* 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, 17, *sub-ss.* 1, 3.
STUCHBERY *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LD. **C. A. 256**

8. —— *Rent restriction — Flat let before September,* 1939—*Landlord covenants to provide hot water and other services—Decision in* 1944 *that value of services took letting outside Acts—Decision of* 1944 *not operating in rem—Flat re-let at increased rent on similar terms—*

LANDLORD AND TENANT—*continued.*

Tenant not bound by 1944 decision—Res inter alios acta—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 11, *sub-s.* 1.
LAZARUS-BARLOW *v.* REGENT ESTATES CO., LD. AND ANOTHER - - **C. A. 465**

9. —— *Rent restriction — Possession — Certificate of County Agricultural Executive Committee that a farm worker "was employed" on work necessary for the working of an agricultural holding — Employee dies — Another worker agrees to do work if cottage available—Whether certificate valid—Omission of words "or is to be employed"—Immaterial mistake—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *sch. I., para.* (*g*) (ii).
HARRIS *v.* ROWLEY - - **C. A. 697**

10. —— *Rent restriction — Premises let — User contemplated that of a shop—Subsequently, in fact, used by tenant partly as residence—Knowledge of landlord—Acceptance of rent—No full knowledge by landlord of user—No acceptance of changed position—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.
Action brought in High Court—Costs—Rent and Mortgage Interest (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2.
WOLFE *v.* HOGAN - - **C. A. 194**

11. —— *Rent restriction — Standard rent — Head-lease at rent of* 300*l.—Covenant against sub-letting without landlord's consent—On January* 1, 1930, *premises in occupation of sub-tenant at a rent of* 225*l.—Sub-letting in breach of covenant—In* 1943 *landlord waives breach of covenant—Unlawful sub-letting to be disregarded—Standard rent* 300*l.—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 17) *s.* 5, *sub-s.* 5; *s.* 12, *sub-s.* 1 (*a*); *s.* 15, *sub-s.* 3.
EDGWARE ESTATES, LD. *v.* COBLENTZ **C. A. 717**

12. —— *Rent restriction — Standard rent — Premises prior to* 1930 *let at* 14*s. per week—Premises owner-occupied from* 1930 *to* 1936—*Premises let from November* 30, 1946, *at* 35*s. per week—Registration—Whether premises again brought under control by Increase of Rent and Mortgage Interest* (*Restriction*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *ss.* 2, 4.
NORTON AND ANOTHER *v.* WHITE **C. A. 87**

13. —— *Rent restriction — "Tenant" — Death of tenant holding a statutory tenancy and leaving no widow—Member of tenant's "family," residing with him at and for six months before tenant's death—"Adopted" child having lived for nearly forty years with adopter—No legal adoption—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)—*Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 13.
BROCK *v.* WOLLAMS - - **C. A. 388**

14. —— *Standard rent — Letting at higher rent—Burden imposed on landlord in lease—Burden not mentioned in previous tenancy agreement—Burden then voluntarily undertaken by landlords—Transfer of burden to landlords—Some increase of rent thereby justified—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.
SEAFORD COURT ESTATES, LD. *v.* ASHER **C. A. 481**

15. —— *Requisitioning — Ground floor of requisitioned house de-requisitioned—Freeholder enters into possession of ground floor and denies access to upper* (*requisitioned*) *floor —Application by town clerk to Ministry of Health to re-requisition ground floor so as to render freeholder a licensee and obtain control of access—Town clerk delegated to re-requisition—Authority granted by official of Ministry of Health—No evidence of personal instruction by Minister to official—Notice of requisition posted on porch of occupied house without actual entry—Right to town clerk to sue for statutory possession—Whether requisition delegated, intra vires—Whether it appeared necessary or expedient to take possession for housing accommodation.*
METROPOLITAN BOROUGH AND TOWN CLERK OF LEWISHAM *v.* ROBERTS - **C. A. 608**

16. —— *Tenant holds over after expiration of twenty-one years' lease for two years — Tenancy then terminated by notice to quit—No claim for compensation "not less than twelve months" before termination of twenty-one years' lease—Claim for compensation within one month after service of notice to quit—"Period of not less than five years"—Need not be under one and the same title—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-s.* 1.
LAWRENCE *v.* SINCLAIR - **C. A. 77**

LIMITATION OF ACTION — *Action for debt due to shareholder by public limited liability company—Defence, debt did not accrue within six years before action brought—Reply that written acknowledgment of debt signed by agent of company made to plaintiff within those six years—Acknowledgment contained in balance sheet: "To sundry creditors* 7,638*l.* 8*s.* 10*d.*" *—Balance sheet presented at annual general meeting of the company and signed by accountants as agents of company—Plaintiff present at meeting as a shareholder—Oral evidence given*

LIMITATION OF ACTION—*continued.* *by accountant that debt due to plaintiff was included in that figure—Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 ; *s.* 23, *sub-s.* 4 ; *s.* 24, *sub-ss.* 1 *and* 2.
JONES *v.* BELLGROVE PROPERTIES, LD. **C. A. 700**

LOCAL GOVERNMENT — *Compulsory acquisition of land — Compensation — Agricultural land—Development restricted by Town and Country Planning Act*, 1947—*Notice to treat after Act passed but before appointed day for operation of Act — Permanent restriction against development to be assumed—Amenity value of land—Acquisition of Land (Assessment of compensation) Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *sub-s.* 2—*Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 55, *sch. III.*
EXECUTORS OF WALTER SAMPSON, DECD. *v.* NOTTINGHAMSHIRE COUNTY COUNCIL **Divl. Ct. 439**

2. —— *Education — Failure to attend regularly at school—" Unavoidable cause "—Education Act*, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *s.* 39, *sub-s.* 2 (*a*).
JENKINS *v.* HOWELLS - **Divl. Ct. 218**

3. —— *Town and country planning—Plans prepared for bungalows—Local authority refuse consent to erection—Appeal to Minister of Town and Country Planning—Appeal withdrawn—Local authority give consent—That consent revoked—Erection not commenced—Whether claimant entitled to compensation in respect of expenditure incurred in preparation of plans—Town and Country Planning (Interim Development) Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 29), *s.* 7, *sub-ss.* 2, *and* 3.
HOLMES *v.* BRADFIELD RURAL DISTRICT COUNCIL - - - - - **Divl. Ct. 1**

MANDAMUS. *See* ROAD TRAFFIC.

MASTER AND SERVANT. *See* PETITION OF RIGHT.

MEDICAL PRACTITIONER — *Unregistered person—Doctor of Medicine of Berlin University—Use of descriptions " Doctor of Medicine " and " M.D., BLN " Medical Act*, 1858 (21 *&* 22 *Vict.*, *c.* 90), *s.* 40.
YOUNGHUSBAND *v.* LUFTIG **Divl. Ct. 354**

METROPOLITAN WATER BOARD — *Opening of highway to repair stopcock—Temporary reinstatement by board—Notice to highway that permanent reinstatement necessary—Reinstatement negligently carried out by authority — Accident to plaintiff — Claim against Water Board—Reinstatement in part only undertaken by highway authority—Board released from liability—Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict.*, *c.* 17), *s.* 32 —*Metropolis Management Act*, 1855 (18 *&* 19 *Vict.*, *c.* 120), *s.* 114.
RIDER *v.* METROPOLITAN WATER BOARD **Devlin J. 378**

MISTAKE—*Promise by local authority to pay employees on war service excess of wage over service pay—Overpayment made, through no fault of employer—Right of employer to recover overpayment, unless employee had changed his position for the worse.*
LARNER *v.* LONDON COUNTY COUNCIL **C. A. 683**

NEGLIGENCE—*Contributory negligence does not postulate a duty by plaintiff to defendant—Sole question whether failure to exercise reasonable care was a cause of the injury—*Davies *v.* Mann *decision, to-day—" Last " opportunity " as a test on causation.*
DAVIES *v.* SWAN MOTOR CO. (SWANSEA) LD. JAMES, THIRD PARTY - - **C. A. 291**

2. —— *Invitor and invitee — Duty of invitor—Damage from " unusual danger "—Danger from point of view of particular invitee.*
HORTON *v.* LONDON GRAVING DOCK CO., LD. - - - - - **Lynskey J. 584**

3. —— *Nuisance — Fall of tree on highway —Injury to motorists driving on highway—Fall of tree attributable to root disease—No indication of disease—Failure to lop—Duty of occupier of land with regard to trees thereon.*
CAMINER AND WIFE *v.* NORTHERN AND LONDON INVESTMENT TRUST, LIMITED **C. A. 64**

4. —— *See* RAILWAY ; LANDLORD AND TENANT.

NUISANCE—On highway. *See* NEGLIGENCE.

PARTNERSHIP—*Change of constitution—Notice of dissolution—Advertisement—Rights of persons dealing with the firm—" Apparent " members " Partnership Act*, 1890 (53 *&* 54 *Vict.*, *c.* 39), *ss.* 14 *and* 36.
TOWER CABINET CO., LD. *v.* INGRAM **Divl. Ct. 397**

PENSION—*Members of tribunal not in agreement—Claim allowed by majority—Decision not effective—Binding effect of decision of judge in pensions appeal—Pensions Appeal Tribunals Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 39).
MINISTER OF PENSIONS *v.* HORSEY **Ormerod J. 526**

PETITION OF RIGHT—*Claim by British ex-soldier to money taken from him by Military authorities in Egypt—Money acquired by soldier in consideration of his presence in uniform on civilian lorry loaded wtih illicit cargo—Relation of Crown to soldier—Whether same as that of master and servant—Money acquired solely by use of uniform and military position—Title of Crown to money.*
READING *v.* THE KING - **C. A. 232**

PHARMACIST—*Penicillin—Supply or sell—Unregistered person—" Acting in accordance " with the directions "—Prescription—Penicillin Act*, 1947 (10 & 11 *Geo.* 6, *c.* 29), *s.* 1, *sub-s.* 1 (*a*) *and* (*b*).
Roberts *v.* Coombs - - - **Divl. Ct. 221**

PRACTICE—*Libel action claiming injunction and damages—No defence—Plaintiff not bound to move for judgment—Right to have action set down for trial—Rules of Supreme Court, Or.* 27, *r.* 11; *Or.* 30, *r.* 1; *Or.* 36, *r.* 1.
Nagy *v.* Co-operative Press, Ld. **C. A. 188**

2. —— *Solicitor — Garnishee proceedings —Solicitor claims lien on debt for costs—No charging order—Garnishee order made absolute —Right of judgment debtor to appeal— R. S. C.*, 1883, *Or.* 45, *r.* 5.
James Bibby, Ld. *v.* Woods and Howard **Divl. Ct. 449**

3. —— *See* County Court.

PURCHASE TAX. *See* Revenue.

RAILWAYS — *Negligence — Injury to person meeting railway passengers at Paddington station—Invitee or licensee—Liability of Railway Executive.*
Stowell *v.* The Railway Executive **Lynskey J. 519**

RATING — *Derating — " Industrial " hereditament — " Factory " — Propeller testing station—Rating and Valuation* (*Apportionment*) *Act*, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1.
Acton Borough Council *v.* West Middlesex Assessment Committee and Another - - - - **Divl. Ct. 10**

2. —— *Letting of some rooms in house—Retention of remaining rooms by landlord for own use—No structural alteration or separate door for use of incomer—Presumption that landlord retains control of, not rebutted—One rateable occupation.*
Helman *v.* Horsham and Worthing Assessment Committee - **C. A. 335**

REQUISITIONING. *See* Landlord and Tenant.

REVENUE — *Customs — Purchase tax — Wholesale merchants — Commissioners application for information as to goods from whom purchased and to whom sold—Whether liable for information as to sales—Meaning of " purchase "—Finance* (*No.* 2) *Act*, 1940 (3 & 4 *Geo.* 6, *c.* 48), *s.* 41, *sub-s.* 1—*Finance Act*, 1946 (9 & 10 *Geo.* 6, *c.* 64), *s.* 20, *sub-s.* 3; *s.* 67.
Commissioners of Customs and Excise *v.* Ingram - - - - **C. A. 103**

REVENUE—*continued.*

2. —— *Surtax — Settlement — " Body " corporate connected with the settlement "—Company makes payments on behalf of settlor—Sums paid " directly or indirectly to the " settlor "—Payment made by " way of loan " —Sums chargeable to tax—Finance Act*, 1938 (1 & 2 *Geo.* 6, *c.* 46), *ss.* 40, *sub-ss.* 1, 3, 5, 41, *sub-s.* 4 (*e*).
Potts' Executors *v.* Inland Revenue Commissioners - - - **C. A. 706**

ROAD TRAFFIC—*Goods vehicles—Licensing authority—Application by holders of a public carrier's " A " licence to change operating centre — Refusal — Mandamus — Transport Act*, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 52, *sub-s.* 1; *s.* 58, *sub-ss.* 3, 4.
Rex *v.* The Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area. *Ex parte* B. E. Barrett, Ld. - - - - - **Divl. Ct. 17**

2. —— *Motor vehicle—Insurance—Third party risks—Owner of vehicle covered against legal liability—Unauthorised act by authorised driver in course of employment—Delegation of driving to unlicensed learner—Policy in force in relation to user of vehicle—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35.
Marsh *v.* Moores (J.). Marsh *v.* Moores (P.) - - - - - **Divl. Ct. 208**

SALE OF GOODS — *Purchase of boiler by laundry company—Part of profit-making plant—Delay in delivery—Measure of damages —Loss of business profits.*
Victoria Laundry (Windsor), Ld. *v.* Newman Industries, Ld. Coulson & Co., Ld. (Third Parties) - - **C. A. 528**

2. —— *Rights of unpaid seller—Contract for sale of motor-boat—Deposit by buyer—Buyer's default in completion—Re-sale by seller—Whether operative as rescission of contract—Buyer's right to return of deposit—Sale of Goods Act*, 1893 (56 & 57 *Vict.*, *c.* 71), *ss.* 39, 48.
Gallagher *v.* Shilcock **Finnemore J. 765**

3. —— *See* County Court.

SEAMEN. *See* Canada.

SHIP — *Charterparty — Demurrage — Specified daily rate of discharge of cargo—Exceptions clause—Delay in discharge due " to any other cause beyond the charterers " control "—Order in country of discharge prohibiting discharge between specified hours—Resulting delay—Order unknown to either party when contract made—Applicability of exception.*
Steamship " Induna " Co., Ld. *v.* British Phosphate Commissioners **Sellers J. 430**

SOLICITOR. *See* PRACTICE.

TOWN AND COUNTRY PLANNING. *See* LOCAL GOVERNMENT.

VENDOR AND PURCHASER — *Contract for sale of land—Vendor's breach of duty of care—Vendor's delay in completion—Damages awarded after completion.*
PHILLIPS *v.* LAMDIN **Croom-Johnson J. 33**

WATER — *Land drainage — Catchment board — Cleansing watercourse — Dredgings deposited on bank of river—Diversion of flood-water—Damage to bridge of adjoining land-owner—Injury through exercise of board's statutory powers — Compensation — Action for damages for nuisance—Not maintainable—Limitation — Public authority — Commencement of action within one year of neglect or default—Continuing act, neglect or default—Land Drainage Act*, 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1—*Limitation Act*, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21.
MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD - **Byrne J. 456**

BIBL. LONDIN UNIV.